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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOHN C. ELLINGSWORTH, Warden,
Sussex Correctional Institution, and
CHARLES M. OBERLY, III, Attorney
General of the State of Delaware,

Petitioners,

v.

GEORGE L. REYNOLDS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Delaware state courts found that the defendant forfeited his constitutional claim by deliberately choosing, as part of tactical strategies, to forego presenting it during his trial or on direct appeal. The court of appeals held that this Delaware procedural ruling was not an "adequate" state ground which barred federal habeas relief. The questions presented are:

(1) Did the court of appeals err in rejecting the state courts' declaration of a procedural default?

(2) Did the court of appeals err in finding as inadequate Delaware's version of *Wainwright v. Sykes*?

(3) Irrespective of the adequacy of the state courts' procedural ruling, did the court of appeals err in allowing the defendant access to federal habeas relief, despite findings by the district court that he intentionally chose not to present his claim at trial or on direct appeal?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES AND COURT RULES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

CONCLUSION 26

APPENDIX:

Federal Decisions

George L. Reynolds v. Jack C. Ellingsworth, et al., No. 86-5633 (3d Cir. Mar. 31, 1988) ..... App. 1

George L. Reynolds v. Jack C. Ellingsworth, et al., No. 86-5633 (3d Cir. Apr. 14, 1988) (order amending opinion) ..... App. 32

George L. Reynolds v. Jack C. Ellingsworth, et al., No. 86-5633 (3d Cir. May 24, 1988) (opinion denying rehearing) ..... App. 34

George L. Reynolds v. John C. Ellingsworth, et al., Civ. Act. No. 86-142-JRR (D.Del. Sept. 2, 1986) (order adopting Magistrate's Report and Recommendation) ..... App. 38

George L. Reynolds v. John C. Ellingsworth, et al., Civ. Act No. 86-142-JRR (D.Del. July 25, 1986) (Magistrate's Report and Recommendation) ..... App. 39

TABLE OF CONTENTS–Continued

Page

George L. Reynolds v. Jack C. Ellingsworth, et al., No. 86-5633 (3d Cir. Mar. 31, 1988) (judgment) ..... App. 46

George L. Reynolds v. Jack C. Ellingsworth, et al., No. 86-5633 (3d Cir. May 24, 1988) (order denying rehearing) ..... App. 47

Related State Decisions

George L. Reynolds v. State of Delaware, 424 A.2d 6 (Del. 1980) (No. 204, 1979) ..... App. 48

State of Delaware v. George L. Reynolds, Crim Act. Nos. IS76-04-0026, etc. (Del. Super. Dec. 9, 1983) ..... App. 53

George L. Reynolds v. State of Delaware, No. 370, 1983 (Del. Jan. 16, 1985) ..... App. 60

State of Delaware v. George L. Reynolds, Crim. Act. Nos. IS76-04-0026, etc. (Del. Super. Mar. 12, 1986) ..... App. 63

George L. Reynolds v. State of Delaware, No. 73, 1986 (Del. Mar. 26, 1986) (entry of voluntary dismissal) ..... App. 66

Statutory Provisions ..... App. 67

TABLE OF AUTHORITIES

Page

CASES

Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987) (*per curiam*), *cert. granted*, 108 S.Ct. 1106 (1988) (No. 87-121) 15

Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir.), *cert. denied*, 459 U.S. 853 (1982), 459 U.S. 878 (1982) 17

Amadeo v. Zant, 108 S.Ct. 1771 (1988)..... 22

Bailey v. State, 422 A.2d 956 (Del. 1980) 21

Brownstein v. Director, Illinois Department of Corrections, 760 F.2d 836 (7th Cir.), *cert. denied*, 474 U.S. 858 (1985) 25

Conyers v. State, 396 A.2d 157 (Del. 1978) 20

Conyers v. State, 422 A.2d 345 (Del. 1980), *aff'g*, 413 A.2d 1264 (Del. Super. 1979)..... 7, 10, 11, 20, 21, 25

Curran v. Wooley, 101 A.2d 303 (Del. Super. 1953), *aff'd*, 104 A.2d 771 (Del. 1954) 18

Davis v. United States, 411 U.S. 233 (1973) 21, 25

Engle v. Koehler, 707 F.2d 241 (6th Cir. 1983), *aff'd by an equally divided Court*, 466 U.S. 1 (1984) 17

Fay v. Noia, 372 U.S. 391 (1963) 19, 22, 23, 25

Francis v. Henderson, 425 U.S. 536 (1976)..... 21

Harris v. Reed, 822 F.2d 684 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 1107 (1988) (No. 87-5677) ... 12, 19

Hawkins v. LeFevre, 758 F.2d 866 (2d Cir. 1985) 25

Henry v. Mississippi, 379 U.S. 443 (1964)..... 19, 22, 23

Johnson v. Muncy, 830 F.2d 508 (4th Cir. 1987) 15

TABLE OF AUTHORITIES–Continued

Page

Johnson v. State, 460 A.2d 539 (Del. 1983).....20

Kaufman v. United States, 394 U.S. 217 (1969) 24, 25

King v. State, 239 A.2d 707 (Del. 1968) 19

Maine v. Moulton, 474 U.S. 159 (1985) 4

McBee v. Grant, 763 F.2d 811 (6th Cir. 1985) 17

Meadows v. Holland, 831 F.2d 493 (4th Cir. 1987) (*en banc*), *pet. for cert. filed*, No. 87-6063 (U.S. Dec. 14, 1987) 17

Murray v. Carrier, 477 U.S. 478 (1986) 24

Priest v. State, 227 A.2d 576 (Del. 1967) 19

Reed v. Ross, 468 U.S. 1 (1984) 11, 12, 16, 24

Rocker v. State, 240 A.2d 141 (Del. 1968).....19

Rose v. Lundy, 455 U.S. 509 (1982)..... 10, 13

Slayton v. Smith, 404 U.S. 53 (1971).....13

Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986) (*en banc*) 15

State v. Curran, 116 A.2d 782 (Del. Super. 1955), *aff'd*, 122 A.2d 126 (Del.), *cert. denied*, 352 U.S. 913 (1956).....19

State v. Herhal, 307 A.2d 553 (Del. Super. 1973).....19

United States v. Bowen, 94 F.Supp. 1006 (N.D. Ga.), *aff'd*, 192 F.2d 515 (5th Cir. 1951) 19

United States v. Frady, 456 U.S. 152 (1982) 16

United States v. Moore, 166 F.2d 102 (7th Cir. 1948) 19

TABLE OF AUTHORITIES–Continued

Page

United States ex rel. Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982) 19

United States ex rel. Cruz v. LaVallee, 448 F.2d 671 (2d Cir. 1971), *cert. denied*, 406 U.S. 958 (1972) 26

United States ex rel. Schaedel v. Follette, 447 F.2d 1297 (2d Cir. 1971) 26

United States ex rel. Terry v. Henderson, 462 F.2d 1125 (2d Cir. 1972) 26

Wainwright v. Sykes, 433 U.S. 72 (1977) ..... *passim*

Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 1566 (1987) 15

Williams v. Georgia, 349 U.S. 375 (1955) 13

STATUTES AND COURT RULES

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2254 8

28 U.S.C. § 2255 ..... 18, 24, 25

Rule 33, Delaware Superior Court Rules of Criminal Procedure (1975) 9

Rule 35(a), Delaware Superior Court Rules of Criminal Procedure (1975) 3, 7, 18

Rule 51, Delaware Superior Court Rules of Criminal Procedure (1975) 3, 11, 20

Rule 52(b), Delaware Superior Court Rules of Criminal Procedure (1975) 3

Interim Rule 61, Delaware Superior Court Rules of Criminal Procedure (1987 Interim Supp.) 7

TABLE OF AUTHORITIES–Continued

Page

Delaware Superior Court Rules of Criminal Procedure (1975), Revisor's Notes 18

Other Authorities

Herrmann, "The New Rules of Procedure in Delaware," 18 F.R.D. 327 (1956) 18

Metzler, "State Court Forfeitures of Federal Rights," 99 Harv. L. Rev. 1128 (1986)..... 16

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GEORGE L. REYNOLDS,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

John C. Ellingsworth, Warden of the Sussex Correctional Institution, and Charles M. Oberly, III, Attorney General of the State of Delaware, petitioners, request that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered March 31, 1988 and May 24, 1988.

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 843 F.2d 712 (3d Cir. 1988) and is reproduced in the Appendix at 1-31. The opinion denying petitioners' motion for panel rehearing is not yet reported and is reproduced in the Appendix at 34-37.

The order of the United States District Court for the District of Delaware (App. 38), adopting the magistrate's recommendation (App. 39-45), is not reported. The following opinions of the state courts are also reproduced in the appendix:

1. The 1980 opinion of the Delaware Supreme Court, affirming respondent's convictions on direct appeal is reported at 424 A.2d 6 (1980) (App. 48-52);

2. The 1983 order of the Delaware Superior Court, denying respondent's initial motion for state post-conviction relief, is not reported (App. 53-59);

3. The 1985 order of the Delaware Supreme Court, affirming the denial of respondent's first state post-conviction application, is not reported (App. 60-62); and

4. The 1986 opinion of the Delaware Superior Court, denying respondent's second motion for state post-conviction relief, is not reported (App. 63-65); the respondent withdrew his appeal from that judgment (App. 66).

JURISDICTION

The judgment of the court of appeals, vacating the decision of the district court and remanding the case for further proceedings, was entered on March 31, 1988. (App. 46). A timely motion for rehearing was denied on

May 24, 1988. (App. 47). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND COURT RULES INVOLVED

Rules 35(a), 51, and 52(b) of the Delaware Superior Court Rules of Criminal Procedure (1975) are reproduced in the Appendix at 67-68.

STATEMENT OF THE CASE

In 1977, a jury found George Lee Reynolds guilty of first degree murder, first degree robbery, and second degree conspiracy. Reynolds was sentenced to life imprisonment without parole plus 20 years.

1. The Trial

On November 29, 1974, Frank Snyder was robbed and brutally murdered in his general store in Milton, Delaware. For fourteen months, the crimes remained unsolved. Then, in February, 1976, George Reynolds, while being questioned about an unrelated robbery, told the police that he knew who had killed Snyder. But when the police returned a few days later, he refused to give them any further details, saying he did not want to be a "snitcher." App. 5 & n. 2 ("the February statements").[1]

[1] At this time, Reynolds was in jail awaiting trial for that unrelated crime.

However, in late March, 1976, Reynolds again contacted the police and, after speaking with his father, gave the authorities two separate statements. In those statements, he implicated John Rooks, Thomas Young, and himself in the Snyder homicide. Trial Transcript ("Tr.") 128-32 ("the March 28 and 31 statements").

In 1977 Reynolds was tried separately for his participation in the robbery and slaying of Snyder. During his opening statement to the jury, the prosecutor referred to the March 28 and 31 statements. App. 3-4.[2] Yet, when the prosecutor sought to introduce the February and March statements into evidence, defense counsel requested a hearing, outside the presence of the jury, to determine their admissibility. App. 4. At the end of that hearing, the prosecutor withdrew his offer of the March 28 and 31 statements. App. 4; Tr. 201, 209. During a recess, the prosecutor had spoken to the attorney who had represented Reynolds on the unrelated charge during March 1976. Tr. 199. While the attorney could not specifically recall whether he had agreed to the late March questioning, he told the prosecutor that his normal practice was to tell his clients not to speak to the police. Tr. 200. Based on that conversation, the prosecutor decided that he could not argue for the admission of the later statements. App. 4; Tr. 201.[3]

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[2] Reynolds did not file any pre-trial motion seeking to exclude any of his statements.

[3] The trial court admitted the February statements. App. 4. In deciding that the attorney-client relationship on the unrelated robbery charge precluded any police questioning concerning the Snyder killing, the prosecutor overestimated the reach of the right to counsel under the sixth amendment. *Maine v. Moulton*, 474 U.S. 159, 178-80 (1985).

To Reynolds' two experienced trial attorneys, Joseph Hurley and Karl Haller, this announcement was "a substantial victory" which made them eager "to push forward to conclude the trial because they then anticipated a verdict in defendant's favor." App. 57.[4] The defense lawyers understood that a court could find error if evidence referred to in a prosecutor's opening statement is not subsequently introduced, 2 PTr. 15-16, but they did not want to abort this trial. In their view, the prosecutor's case had now been seriously weakened by his withdrawal of the March statements. 2 PTr. 18, 26-27, 33. A mistrial would give the prosecutor an opportunity not only to strengthen his overall presentation at a second trial, but to re-assess his decision concerning the admissibility of the March statements. App. 42, 57; 2 PTr. 18-20. At the same time, the lawyers, based on their experience, believed that the jury had probably forgotten the prosecutor's opening remarks. App. 57. As a result, they did not move for a mistrial. For similar reasons, defense counsel did not request the trial judge to admonish the jury concerning the prosecutor's references to the March statements in his opening remarks. They feared that such a curative instruction would only rekindle the jury's recollection of the remarks. App. 57.

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[4] This recitation of defense counsel's motivations is based on testimony given by them before the Delaware Superior Court in Reynolds' first state post-conviction motion ("PTr."). The Superior Court, in its findings, credited their explanations for their actions. *See* App. 53-59. In turn, the federal magistrate, who initially considered Reynolds' federal habeas corpus petition, independently reviewed the record and concluded that the state court's findings had fair support in the record. App. 42-43.

Five days later, the jury found Reynolds guilty of murder, robbery, and conspiracy.[5] After the verdict, defense counsel filed a motion for a judgment of acquittal. Although that motion argued that the prosecutor had made inappropriate remarks in his summation, it did not mention his earlier reference to the withdrawn March statements. Thereafter, Haller, who was to be responsible for Reynolds' appeal, began formulating the issues to be presented. After researching the issue of the divergence between the prosecutor's opening argument and his subsequent failure to introduce the statements, he decided not to raise it in his briefs to the Delaware Supreme Court. In his mind, the argument lacked merit and, if pressed, would only detract from other more meritorious arguments. App. 57.

Initially, the Delaware Supreme Court remanded the appeal to the Superior Court to allow defense counsel to present a motion for a new trial based on newly discovered evidence. *See* App. 8 & n. 7. After that motion failed, it then affirmed Reynolds' convictions. 424 A.2d 6 (Del. 1980). App. 48-52.

2. State Post-Conviction Proceedings

Two years later, Reynolds, now represented by different counsel, filed for post-conviction relief under Delaware's then-existing post-conviction remedy, Superior

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[5] In his defense, Reynolds called four witnesses and introduced, through the testimony of a state psychiatrist, the "favorable" results of a "truth serum" test administered to him. App. 49.

Court Criminal Rule 35(a) (App. 67).[6] Disavowing any claim that his trial attorneys had been ineffective,[7] Reynolds argued that the prosecutor's opening remarks and his subsequent withdrawal of the March statements violated the federal due process and confrontation clauses. The Superior Court held two days of evidentiary hearings to determine why Hurley and Haller had not raised this claim during the trial and on direct appeal. Based on their testimony, it concluded that their actions were not the result of either inadvertance or ignorance of the law, but reflected choices to omit the due process argument while pursuing other avenues of defense. App. 57-58. To the court, such tactical conduct precluded Reynolds from now asserting the claim in a post-conviction motion. App. 58.

The Delaware Supreme Court again affirmed. Referring to its earlier opinion in *Conyers v. State*, 422 A.2d 345 (Del. 1980), in which it had adopted the rationale of *Wainwright v. Sykes*, 433 U.S. 72 (1977), for Rule 35 motions, the court held that state post-conviction relief remained unavailable for claims "which reasonably competent counsel intentionally chose not to press, in accordance with procedural rules, as part of a tactical strategy." App. 61. Because the record established that

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[6] Effective January 1, 1988, Delaware adopted, on a two year interim basis, a new post-conviction rule. Del. Super. Ct. Crim. R. 61 (1987 Interim Supp.).

[7] Defendant's Br. in Response to State's Post-Evidentiary Hearing Memo on Def.'s Motion for Post-Conviction Relief at 22 n. * (July 14, 1983), *State v. George L. Reynolds*, Crim. Act. Nos. IS76-04-0026, etc. (Del. Super. Dec. 9, 1983).

Reynolds' attorneys had made such a strategic choice, the Superior Court had properly denied his post-conviction motion. App. 61-62.

Undaunted, Reynolds then filed a second post-conviction motion. In it, he renewed his due process and confrontation clause arguments, but now added a claim that Hurley and Haller had been ineffective in not objecting to the opening statement during the trial or raising the issue on appeal. The Superior Court dismissed the motion as repetitive, App. 63-65, and Reynolds subsequently voluntarily dismissed his appeal of that decision. App. 66.

3. Federal Habeas Corpus Proceedings

A *pro se* federal habeas corpus petition under 28 U.S.C. § 2254 was next. In that action, Reynolds advanced three claims relating to the prosecutor's opening remarks: 1) that the reference to the March 28 and 31 statements was improper since the statements were never admitted into evidence; 2) that the trial judge should have *sua sponte* instructed the jury to disregard the prosecutor's comments; and 3) that defense counsel were ineffective under the sixth amendment since they did not object at trial or raise the issue on direct appeal.[8] The district court referred the petition to a federal magistrate. After independently reviewing the state court record, he concluded, as had the state Superior Court, that Haller and Hurley had made strategic choices not to press the

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[8] The former two contentions will be referred to as the due process claims. The latter argument will be called the sixth amendment claim.

due process claims during the trial or on direct appeal. App. 42-43. Because such deliberate conduct could not establish justifiable cause under *Wainwright v. Sykes*, 433 U.S. 72 (1977), he decided that the due process claims were procedurally barred. App. 41, 43. The magistrate did, however, reach the merits of the sixth amendment claim. Concluding that defense counsel's decision-making concerning the mention of the March statements fell within the wide range of professionally competent representation, he recommended that relief be denied. App. 43-44. The district court adopted the magistrate's recommendation in full and dismissed the petition. App. 38.

On appeal, the court of appeals overturned the procedural default analysis used by the district court. Believing that *Sykes* required it, *sua sponte*, to make an initial analysis of whether a state procedural bar is an "independent and adequate" state ground to preclude federal review, the court conducted its own survey of Delaware's procedural rules. From that examination, it concluded, contrary to the opinions of the state courts, that Delaware had no procedural rule which prevented Reynolds from presenting his due process claims for the first time in a state post-conviction motion. App. 13-18. In its view, no specific rule or decision required him to present his claim at trial or on direct appeal. App. 18. It acknowledged that Reynolds had foregone three opportunities, available under the state's procedures, to raise his claim during the trial process or on direct appeal.[9] The court, however,

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[9] *See* App. 19. Those opportunities included a motion for mistrial made during the trial, a post-trial motion for new trial under Del. Super. Ct. Crim. R. 33, and an appeal of right to the state supreme court.

refused to equate those opportunities with a contemporaneous objection rule because none of the procedures had an express forfeiture sanction for non-compliance. App. 19. Moreover, the *Conyers* opinion, cited by the state courts, did not apply because, again in the court's view, that ruling only applied to a failure to file a suppression motion. App. 20. Finally, the court found that the Delaware courts had, in several earlier opinions, excused procedural defaults in cases on direct appeal and in motions for post-conviction relief. It took these few examples of discretion as evidence that Delaware applied its procedural bars only sporadically. App. 22-23. Based on these factors, and without any mention of the findings that defense counsel had failed to press the claim as part of a tactical strategy, the court of appeals held that the procedural rule used by the state courts lacked sufficient independence and adequacy and the district court had thus erred in dismissing the due process claim under *Sykes*. App. 25-26.

Turning to Reynolds' sixth amendment claim, the court ruled that there was a substantial question whether it had been sufficiently exhausted and, if so, whether it was now procedurally barred. App. 28-30. Recognizing that *Rose v. Lundy*, 455 U.S. 509 (1982), would require the dismissal of Reynolds' entire petition if further state procedures to present this claim remained available, the court chose to vacate the district court's sixth amendment ruling and remand the matter for further proceedings on the exhaustion issues. App. 30-31.[10]

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[10] After the filing of this opinion, the State moved for reargument on two grounds. First, it asserted that the court's

(Continued on following page)

REASONS FOR GRANTING THE WRIT

A direct clash between a state court and a lower federal court over an interpretation of state law is always a cause for concern. When that clash arises because of uncertainty about the appropriate relationship between two separate lines of decisions by this Court, certiorari is appropriate. This case is such a situation.

Two state courts and the district court found that George Reynolds' defense counsel had intentionally chosen, for strategic reasons, not to avail themselves of opportunities during his trial and direct appeal to present an objection to the prosecutor's decision not to introduce two confessions he had mentioned in his opening remarks. The district court, looking to *Reed v. Ross*, 468 U.S. 1, 13-14 (1984), concluded, as did the state courts, that those deliberate decisions by defense counsel precluded post-conviction relief. The court of appeals has now held that, regardless of the reasonableness of counsel's conduct, the State of Delaware cannot, in federal court, hold Reynolds to the consequences of his lawyers' tactical choices. Looking to this Court's decisions under

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survey of state procedural law was incomplete, citing Del. Super. Ct. Crim. R. 51 (App. 67-68) and more than twenty unreported opinions applying the *Conyers* procedural default rule. Secondly, the State suggested that the court had failed to consider whether the uncontradicted findings that defense counsel had deliberately withheld the due process claim were alone sufficient grounds to deny federal relief. The court of appeals, while acknowledging that its survey of state law had not been complete, sustained its original judgment. App. 34-37.

the "independent and adequate state ground" doctrine, it decided that neither the Delaware procedural default rules nor the findings of strategic conduct were sufficient to preclude federal consideration of Reynolds' claim.

This Court should grant review. The question of when a federal habeas court may use the "independent and adequate state ground" doctrine to allow a state prisoner to escape the procedural default rules of *Wainwright v. Sykes*, 433 U.S. 72 (1977), is an important and recurring one, having been posed to this Court before. *Reed v. Ross*, 468 U.S. 1, 8 n. 5 (1984).[11] Yet, the court of appeals not only unnecessarily answered that question, but the answer it provided failed to fully appreciate state law and several decisions of this Court.

1. Because of an Unresolved Question Concerning Exhaustion, the Court of Appeals Improperly Decided The "Adequacy" of Delaware's Procedural Default Rule.

In 26 of the 31 pages of its opinion, the court of appeals expounded on why Delaware did not have a procedural default rule "adequate" to bar consideration

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[11] This petition presents a question concerning the appropriate use in habeas actions of the "adequacy" element of the "independent and adequate state ground" doctrine. This Court has already agreed to decide the question of whether a state court's alternative declaration of a default while deciding the merits of a claim can constitute an "independent" ground precluding federal review. *See Harris v. Reed, cert. granted*, 108 S.Ct. 1107 (1988) (No. 87-5677).

of the merits of Reynolds' due process claim. Yet, it then remanded the entire matter to the district court to determine if Reynolds' other claim, alleging ineffective assistance by his defense counsel, had been sufficiently exhausted. App. 30-31. But clearly, once the court of appeals concluded that Reynolds may not have exhausted state remedies with respect to his sixth amendment claim, thus making his entire petition subject to dismissal on exhaustion grounds, *Rose v. Lundy*, 455 U.S. 509, 518-22 (1982), the court was then obligated to avoid "any implication as to the merits of so delicate a subject" as an interpretation of state post-conviction procedure. *Slayton v. Smith*, 404 U.S. 53, 54 (1971). In *Slayton*, this Court criticized a court of appeals because it had expressed a view on the merits of a sensitive issue of state judicial administration, the competence of a state judge, after concluding that state remedies had not been exhausted. The court of appeals here similarly failed to exercise the restraint required by principles of federalism. Despite an unresolved exhaustion issue, it chose to declare a state procedural ruling "inadequate." By pursuing that course, it not only put itself in an unnecessary conflict with the Delaware Supreme Court over an interpretation of state law but gratuitously implied that the state court judges either misinterpreted their own law or manipulated their procedural rules for the purpose of defeating Reynolds' assertion of his federal claim. *Williams v. Georgia*, 349 U.S. 375, 399 (1955) (Clark, J., dissenting).

In addition, the lower court's action raises serious questions about the appropriate exercise of federal judicial power. If the district court ultimately determines that

the sixth amendment claim is not exhausted and Reynolds chooses not to voluntarily dismiss it, the resolution by the court of appeals of the procedural default issue will become purely advisory, having effect only if and when Reynolds returns from litigation in the state courts. However, in the meantime, judges, both state and federal, will have to struggle with the meaning and scope of the opinion as Delaware prisoners use it to avoid procedural bars.[12] Thus, unless this Court decides to review the correctness of the decision below, this Court should grant the petition and summarily order the court of appeals to vacate its opinion and enter a new judgment simply remanding the matter to the district court for a determination of whether Reynolds' sixth amendment claim has been exhausted.[13]

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[12] This same reason militates in favor of granting review now instead of waiting for any decision on the merits of Reynolds' claim.

[13] Even if, on remand, the district court concludes that the sixth amendment claim is exhausted or, as the court of appeals hopes, App. 30 n. 22, Reynolds voluntarily dismisses it, the procedure suggested here would still be beneficial. The court of appeals broached, *sua sponte*, the issue of the "adequacy" of state law in its original opinion. Thus, the State's only presentation on the question was made from the unenviable position of a request for rehearing. If the decision of the court of appeals is vacated, the district court can then consider the state law issue, allowing both parties the opportunity to fully present their positions.

2. The Court of Appeals' Decision Presents an Important Question Concerning the Extent of a Lower Federal Court's Power to Reject a State Court's Declaration of a Procedural Default.

In the ten years since *Sykes*, this Court has on several occasions defined the limited situations when a federal habeas court may excuse a state prisoner from his procedural defaults in the state courts. But this Court has never examined the nature and scope of a federal habeas court's power to re-examine and overturn a state court's finding that a prisoner defaulted.

The court below is the latest court of appeals to utilize various formulations of an "adequate state ground" doctrine to reject state courts' findings of procedural default and thus allow state prisoners to avoid the strictures of *Sykes*. *Johnson v. Muncy*, 830 F.2d 508, 510-14 (4th Cir. 1987) (Virginia); *Wheat v. Thigpen*, 793 F.2d 621, 624-29 (5th Cir. 1986) (Mississippi), *cert. denied*, 107 S.Ct. 1566 (1987); *Adams v. Dugger*, 816 F.2d 1493, 1497 (11th Cir. 1987) (*per curiam*) (Florida), *cert. granted*, 108 S.Ct. 1106 (1988) (No. 87-121); *Spencer v. Kemp*, 781 F.2d 1458, 1462-72 (11th Cir. 1986) (*en banc*) (Georgia). In each case, as here, the state courts had declared state post-conviction relief unavailable because the defendant had failed to raise his claim during his trial or on direct appeal. The federal courts rejected some of those rulings because, in their view, the procedural bars had only been utilized "inconsistently" or "sporadically." In other cases, the federal courts viewed a state's efforts to modify its post-conviction procedures to be too "novel" a turn of events to justify imposition of a procedural bar.

Regardless of the particular reason for disregarding the state procedural bar, the result of these declarations of inadequacy was to frustrate a state's legitimate attempt to give more finality to its criminal convictions by making the trial and direct appeal the "main event." *See generally Reed v. Ross*, 468 U.S. 1, 11 (1984); *United States v. Frady*, 456 U.S. 152, 164 (1982). Secondly, those inquiries by a federal court intrude into the States' perogatives to define and develop their own procedural law. Even if not binding on the state court, a federal court's declaration of "inadequacy" exerts substantial pressure on the state court in its interpretation and administration of state procedural rules. *See generally* Metzler, "State Court Forfeitures of Federal Rights," 99 Harv. L. Rev. 1128, 1152-58 (1986). If absolute "consistency" is the prerequisite for "adequacy," the state courts may choose to undertake an automaton-like enforcement of state procedure, depriving themselves of whatever discretion that might have existed to forgive procedural lapses. Alternatively, the state courts, believing it useless to enforce state procedure in light of a federal eagerness to parse state procedural law, may simply decide to hear all post-conviction claims on the merits without regard to any procedural penalty. The former choice deprives the state courts of the ability to develop their own state law; the latter option compels them to abandon any interest in orderly procedures. Similarly, if every change in procedural default rules will be rejected in federal courts because of "novelty," the state courts will simply freeze criminal procedure, leading to an Ice Age-like situation in the law and depriving the

nation as a whole of the benefits of experience in the States and federal judiciary in creating new solutions to procedural problems in the criminal justice system.

Finally, there is the ever-present risk that in surveying state procedures for "adequacy," the federal courts will misread state law. Often, as was the case here, the federal courts will not have access to all of the relevant materials. App. 36 & n. 2. Neither consistency in the law nor the prestige of the federal courts is enhanced when a federal court later discovers that it misread state procedural rules.[14] To avoid these results, this Court should grant review to explore the scope of a federal habeas court's power to overturn a state court's declaration of a procedural default.

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[14] Other circuits have had similar difficulties in determining state procedural rules. Thus, the Fourth Circuit had originally concluded that West Virginia did not impose a contemporaneous objection requirement for a "constitutional or jurisdictional challenge." *Adkins v. Bordenkircher*, 674 F.2d 279, 282 (4th Cir), *cert. denied*, 459 U.S. 853, 878 (1982). But after the state courts rigorously applied a contemporaneous objection rule to such claims in eight subsequent cases, the court of appeals had to conclude it had misread state procedural law. *Meadows v. Holland*, 831 F.2d 493, 496-98 (4th Cir. 1987) (*en banc*), *pet. for cert. filed*, No. 87-6063 (U.S. Dec. 14, 1987). *See also McBee v. Grant*, 763 F.2d 811, 814-16 (6th Cir. 1985) (overruling *Engle v. Koehler*, 707 F.2d 241 (6th Cir. 1983), *aff'd by an equally divided Court*, 466 U.S. 1 (1984), and correcting its earlier conclusion that Michigan did not have applicable contemporaneous objection rule).

3. In Rejecting the Delaware Supreme Court's Finding of Procedural Default, the Court of Appeals Misread Delaware Law and Expanded the Adequate State Ground Doctrine.

Even if, as the court of appeals believed, the doctrine of independent and adequate state grounds is to be grafted onto federal habeas procedure, the result in this case is clearly wrong. For 35 years, Delaware has followed federal criminal practice, including federal post-conviction procedure, in its effort to secure fair, but final, disposition of criminal cases. When this Court determined that society's interest in the finality of convictions justified restriction of post-conviction remedies, Delaware followed course. The court of appeals' declaration that Delaware's post-conviction procedures was an inadequate basis to preclude federal review penalizes Delaware for that choice.[15]

At the time of Reynolds' trial in 1977, the state post-conviction remedy was found in Rule 35(a) of the Delaware Superior Court Rules of Criminal Procedure (App. 67). That rule, modeled on 28 U.S.C. § 2255, had been adopted in 1953 when the state courts chose to pattern their rules after those used by the federal courts. *Curran v. Wooley*, 101 A.2d 303, 305-07 (Del. Super. 1953), *aff'd*, 104 A.2d 771 (Del. 1954); Herrmann, "The New Rules of Procedure in Delaware," 18 F.R.D. 327, 331-33 (1956); Del. Super. Ct. Crim. R., revisor's note.

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[15] The court of appeals, in fact, expressed some displeasure with Delaware's choice to follow *Sykes* in determining the availability of state post-conviction relief. App. 17, 26 n. 20.

The state courts fully expected to rely on federal procedural law when interpreting the state rules, Herrmann, 18 F.R.D. at 344, 346, and they have traditionally stayed to the course set by federal procedure. For example, in 1955, the Superior Court, relying on federal decisions interpreting section 2255, observed that to warrant relief under Rule 35(a), "there must be a showing that a retrial could reasonably be expected to result in a different verdict and judgment." *State v. Curran*, 116 A.2d 782, 786-87 (Del. Super. 1955) (Carey, J., concurring), *aff'd*, 122 A.2d 126 (Del.), *cert. denied*, 352 U.S. 913 (1956) (citing *United States v. Bowen*, 94 F.Supp. 1006, 1009 (N.D. Ga.), *aff'd*, 192 F.2d 515 (5th Cir. 1951); *United States v. Moore*, 166 F.2d 102, 104 (7th Cir. 1948)). After this Court's decision in *Fay v. Noia*, 372 U.S. 391 (1963), the state courts had, without citing *Noia*, generally followed its rationale. If counsel had made a tactical choice not to object at trial or present the issue on appeal, the claim was deemed waived. *King v. State*, 239 A.2d 707, 708 (Del. 1968); *State v. Herhal*, 307 A.2d 553, 555 (Del. Super. 1973).[16] Conversely, where it was unclear that the bypass had been deliberate, review was available. *Rocker v. State*, 240 A.2d 141, 143 (Del. 1968) (citing *Henry v. Mississippi*, 379 U.S. 443 (1964)); *Priest v. State*, 227 A.2d 576, 578 (Del. 1967).

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[16] The lower court found *King* and *Herhal* irrelevant because the state courts had decided the merits after declaring a default. That reasoning is inconsistent with the lower court's earlier decision in *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (3d Cir. 1982). In that case, the court concluded that a state prisoner had procedurally defaulted even though the state courts had reached the merits after finding a default. *Accord Harris v. Reed*, 822 F.2d 684, 686-87 (7th Cir. 1987), *cert. granted*, 108 S.Ct. 1107 (1988) (No. 87-5677).

After this Court decided *Wainwright v. Sykes*, 433 U.S. 72 (1977), the state courts again looked at the availability of state post-conviction relief. *Conyers v. State*, 422 A.2d 345 (Del. 1980), *aff'g*, 413 A.2d 1264 (Del. Super. 1979).[17] Consistent with the long-established policy of giving state rules the same interpretation as their federal counterparts, the state courts referred to federal precedents and expressly adopted the federal cause and prejudice test. 422 A.2d at 346. In approving the Superior Court's adherence to the *Sykes* standard, the Delaware Supreme Court reasoned that the test struck the appropriate balance between the State's interest in an orderly process and the avoidance of a miscarriage of justice. *Id.*

Against the background of state reliance on federal decisions interpreting federal procedural requirements, the court of appeals' conclusion that the 1980 decision in *Conyers* could not be applied to Reynolds rings hollow. Since the 1960's, Delaware decisional law had shown that there was a procedural penalty for raising complaints in post-conviction proceedings that had not been made at trial or on direct appeal.[18] This case authority and the

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[17] Conyers had failed to present his fourth amendment objection at trial and on appeal. *See Conyers v. State*, 396 A.2d 157 (Del. 1978) (direct appeal). In 1983, the state courts applied *Conyers* to bar post-conviction consideration of a claim raised at trial, but not on appeal. *Johnson v. State*, 460 A.2d 539 (Del. 1983).

[18] Rule 51 of the Delaware Superior Court Rules of Criminal Procedure (App. 67-68) eliminates the need to make exceptions, but simultaneously requires a party to make known to the court the action he wants taken or his reasons for objecting to action already taken.

long-standing connection between state and federal procedure were sufficient to apprise a criminal defendant that he would be expected to shoulder a procedural burden similar to that imposed on the prisoners in *Davis v. United States*, 411 U.S. 233 (1973); *Francis v. Henderson*, 425 U.S. 536 (1976); and *Sykes*. Indeed, the state court's decision to bar relief under *Conyers* was no more unfair to Reynolds than this Court's decisions to preclude federal collateral review to John Sykes and William Frady.[19]

The rejection by the court of appeals of the state procedural default rule because of inconsistent application is likewise in error. Since the 1980 decision by the state supreme court in *Conyers*, the rule has been consistently applied in over twenty cases. *See* App. 36. The lower court rests its conclusion of inconsistency before *Conyers* on a handful of post-conviction cases.[20] That reliance on so few cases is hardly fair to Delaware given the small size of the state and also overlooks the long-standing adherence to federal procedure.

4. The Court of Appeals' Decision is Inconsistent With Decisions of this Court.

In this case, the court of appeals ignored the findings of two state courts and the district court that defense

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[19] There is no evidence that Reynolds or his attorneys actually relied on the availabiltiy of post-conviction relief when electing to forego the opportunities to press his claim at trial or on direct appeal.

[20] The court of appeals premised its conclusion of inconsistency on the failure of the state courts in *Bailey v. State*, 422 A.2d 956 (Del. 1980), to address the question of default. App. 22-23, 24. Bailey, however, was decided before the state supreme court decided *Conyers*.

counsel deliberately chose, for strategic reasons, not to present the due process claim during the trial and in the direct appeal.[21] Instead, it focused on Delaware procedural rules and decisions, in the abstract, and held that no "adequate" state procedural ground barred federal review. That result, particularly as it used the "independent and adequate state ground" doctrine to excuse Reynolds from the consequences of his lawyers' informed tactical decisions, sharply departs from several decisions of this Court.

Twenty-five years ago, in *Fay v. Noia*, 372 U.S. 391, 428-34 (1963), this Court decided that federal habeas courts are not bound by the doctrine that prevents it from directly reviewing state judgments resting on independent and adequate state procedural grounds. At the same time, it held, based on principles of equity and comity, that if a habeas applicant "forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his claims on the merits." 372 U.S. at 439.

In 1964, this Court in *Henry v. Mississippi*, 379 U.S. 443 (1964), reaffirmed the principle that, regardless of the validity of a state forfeiture, the federal courts have an independent power to deny relief to a defendant because

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[21] Unless clearly erroneous, the district court's findings were binding on the court of appeals. *Amadeo v. Zant*, 108 S.Ct. 1771, 1777-78 (1988).

of his strategic conduct in the state courts. In *Henry*, defense counsel had failed to lodge a timely objection to evidence derived from an illegal search. Although this Court strongly suggested that, on the facts of the case, the state contemporaneous objection bar invoked by the Mississippi courts was not an "independent and adequate" state procedural ground to preclude direct federal review, 379 U.S. at 448, this Court did not simply proceed to consider the merits of the federal claim. Instead, it remanded the matter to the state courts to explore, at a hearing, the possibility that defendant's "counsel deliberately bypassed the opportunity to make a timely objection in the state court." 379 U.S. at 450. Suggesting that defense counsel might have delayed their objection in order to use the evidence, thus enhancing the chances of acquittal, or to invite error, laying a foundation for reversal, the Court reiterated that "[i]f either reason motivated the action of petitioner's counsel and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim whether in the state courts or here." 379 U.S. at 451.

Clearly, *Henry* and *Fay* teach that, even if a state procedural bar is not an adequate ground to preclude federal review, a defendant's conduct in delaying or withholding a claim, for tactical advantage, is in itself an adequate basis to deny federal relief. *Sykes* did not alter this principle.[22] Indeed, this Court has recently

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[22] *Sykes* suggested that the remand in *Henry* was for the purpose of "determin[ing] whether a *separate* adequate state ground might exist – that is, whether petitioner had knowingly and deliberately waived his right to object at trial for tactical or other reasons." *Sykes*, 433 U.S. at 83 n. 8 (emphasis added).

emphasized that a federal habeas court should never "encourage" the view that it is a "hedge against the strategic risks [a defense counsel] takes in his client's defense in state court." *Reed v. Ross*, 468 U.S. 1, 14 (1984). Thus, a defendant "may not make a tactical decision to forego a procedural opportunity – for instance, an opportunity to object at trial or to raise an issue on appeal – and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court." *Id. See also Murray v. Carrier*, 477 U.S. 478, 485 (1986) ("at a minimum," *Sykes* "implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the petitioner").

The court of appeals here disregarded this principle. In its zeal to declare Delaware's procedural default rule "inadequate," it failed to give appropriate deference to the district court's and state courts' conclusions that Reynolds had, as part of a litigation strategy, deliberately bypassed the opportunity to present his claims to the state court during the trial or on direct appeal. That conduct by Reynolds constituted an "inexcusable" procedural default, *Reed*, 468 U.S. at 14, which was a second adequate state ground, *Sykes*, 433 U.S. at 83 n. 8, sufficient to bar federal relief to Reynolds.

In addition, the court of appeals' decision stands in stark contrast to this Court's analysis of a similar situation in *Kaufman v. United States*, 394 U.S. 217 (1969). There, this Court held that a federal prisoner could assert a fourth amendment claim in a collateral proceeding under 28 U.S.C. § 2255 even though he failed to raise the issue in his direct appeal. However, at the same time, the Court pointedly noted that even given this general rule, "the sec. 2255 court may in a proper case deny relief to a

federal prisoner who has deliberately bypassed the orderly federal procedures provided at or before trial and by way of appeal. . . ." 394 U.S. at 227 n. 8. That power existed even though neither any applicable procedural rule nor section 2255 contained any express waiver language indicating that a failure to file a suppression motion or pursue the issue on appeal would preclude federal review. *See Davis v. United States*, 411 U.S. 233, 239-40 (1973).

Here, the state courts simply followed in the footsteps of *Kaufman*. Regardless of the references to *Conyers*, the state courts hold that Reynolds' due process claim was barred because he deliberately bypassed, for strategic purposes, the orderly state procedure provided at or after his trial, e.g., a motion for a mistrial or a motion for a new trial, and on direct appeal. Yet, the court below determined that such reasoning could not be an adequate state ground to preclude federal habeas review. Unless state prisoners are to be afforded greater access to federal collateral review than their federal counterparts, a position this Court has never adopted, the opinion below, in light of *Kaufman*, is plainly wrong.[23]

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[23] The result reached by the lower court is also inconsistent with decisions of the Courts of Appeals for the Second and Seventh Circuits. Those courts have held that even after *Sykes, Noia* precludes federal habeas relief when the defendant, for strategic reasons, elects to bypass opportunities to present his federal claim. *Brownstein v. Director, Illinois Department of Corrections*, 760 F.2d 836 (7th Cir.), *cert. denied*, 474 U.S. 858 (1985); *Hawkins v. LeFevre*, 758 F.2d 866, 873 (2d Cir. 1985). Before *Sykes*, the Second Circuit had consistently held that, despite New York's policy of granting its courts a broad power

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CONCLUSION

For the above reasons, this Court should grant this petition for certiorari and reverse the decision of the court of appeals.

Respectfully submitted,

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(Continued from previous page)

to forgive procedural defaults, habeas relief was unavailable when defense counsel had made a deliberate tactical choice not to object to illegally procured evidence at trial or on direct appeal. *See United States ex rel. Terry v. Henderson*, 462 F.2d 1125, 1128-30 (2d Cir. 1972); *United States ex rel. Cruz v. LaVallee*, 448 F.2d 671, 674-79 (2d Cir. 1971), *cert. denied*, 406 U.S. 958 (1972); *United States ex rel. Schaedel v. Follette*, 447 F.2d 1297, 1298-1301 (2d Cir. 1971).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5633

GEORGE L. REYNOLDS,

Appellant

v.

JACK C. ELLINGSWORTH, WARDEN and
CHARLES M. OBERLY, III

On the Appeal from the United States
District Court for the
District of Delaware
(D.C. Civil Action No. 86-0412 [§ 2254])

Argued November 30, 1987

Before: WEIS, HIGGINBOTHAM and
MANSMANN, *Circuit Judges.*

(Filed March 31, 1988)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This appeal centers on the district court's determination that a procedural default in the state courts barred review of the merits of two claims raised in a petition for writ of habeas corpus challenging a state conviction. 28 U.S.C. § 2254 (1982). Petitioner asserts that the prosecutor's extensive references in his opening statement to two confessions that were never introduced into evidence, and the failure of the trial court to give a curative instruction, denied him due process. We hold that there exists no "independent and adequate state procedural ground," *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), that, as a matter of federal law, bars the district court from reaching the merits of this due process claim. As to petitioner's three claims of ineffectiveness of counsel, however, we find that state remedies may not have been exhausted. Accordingly, we will vacate the decision of the district court and remand the matter for further proceedings.

I.

Petitioner George Lee Reynolds, John Preston Rooks and Thomas Young were all charged in 1976 for the 1974 robbery and murder of Frank Snyder, a store owner in Milton, Delaware. Their arrest marked the culmination of a protracted criminal investigation in which a large number of people, including many who were viewed as suspects, were questioned about the Snyder murder. The three co-defendants were tried separately.

During his opening statement at Reynolds's trial, the prosecutor referred to Reynolds's confessions in this manner:

> You will hear evidence that his co-conspirator held such a trance over the defendant that the defendant was afraid to come forward and testify and yet you will hear evidence that sixteen months after the crime, after speaking with another prison inmate about what he knew about this crime and after talking and receiving counsel from his father, one Jessie Lee James, he got it off his chest. He told the police about the crime and I believe that the testimony will reveal that he told the police about this crime on the 28th day of March, 1976. But, it's a kind of a funny statement, members of the jury panel. He tells about the crime and he tells about the crime with specific detail of things that no one could know unless they were there, details about the crime that had never been revealed in any publication. He told of details of the crime that had never been told to any newspaper or any radio station or to anybody except for the investigating officers. George Lee Reynolds knew certain details about that crime. Furthermore, members of the jury, in addition to these details that he knew about the crime that you will hear about, he lied to us in addition. He told us half the truth. He didn't tell us all of the truth. . . .Is he telling us the truth on the 31st of March, because a little later on you are going to hear George Lee Reynolds say he made it all up to collect the reward. In other words, George Lee Reynolds retracted his story. How is it he retracted his story but he can't retract, members of

> the jury panel, those specific items that are of specific knowledge to the crime that George Lee Reynolds had when he "made up that story"?

Appendix("App.") at 171-173.

Thereafter, an extensive mid-trial hearing was held to determine the admissibility of Reynolds's statements of February 13 and 17, and his confessions of March 28 and 31, 1976. Trial transcript ("T.T.") at 122-215.[1] At this proceeding, testimony was elicited regarding the voluntariness of the March 28 and 31 confessions. In addition, the prosecutor appeared to stipulate that Reynolds's attorney may not have been contacted prior to these interrogations, in violation of the sixth amendment right to counsel. He then, without argument, withdrew his offer of these confessions into evidence. App. at 224-26. The trial judge, after hearing argument based on fifth amendment grounds, ruled that the statements of February 13 and 17 were admissible. T.T. at 210. The trial, which through that point had heard testimony of some twelve witnesses

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[1] Rule 5 of the Rules Governing Proceedings Under § 2254 requires that relevant portions of the state record be filed with the state's answer to the petition for writ of habeas corpus. *See also* Townsend v. Sain, 372 U.S. 293, 319 (1963). Delaware has complied fully with this rule, and we take judicial notice of all relevant parts of the state court record, whether or not they appear in the joint appendix prepared by the parties to this appeal. *See* Swanger v. Zimmerman, 750 F.2d 291, 297 (3d Cir. 1984). Citations will be both to the appendix and, where necessary, to the record.

regarding inconclusive physical evidence, resumed with the testimony of a Delaware police officer concerning the contents of the February 13 and 17 statements.[2] *Id.* at 223. During the course of the trial, defense counsel did not request, nor did the court give, a limiting instruction regarding the references in the opening statement to Reynolds's confessions.

The only witness to link Reynolds to the crime was Miles Cuffee, himself a former suspect. Prior to trial, Cuffee gave the police at least seven different accounts of how he acquired knowledge of the crime.[3] At trial, Detective French, a Delaware police officer, testified to some of

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[2] This witness, Detective Perry, had been qualified at the hearing as an expert on "body language." He testified that on February 13, Reynolds had indicated by his body language that he "had some intimate knowledge of the incident." T.T. at 239. Perry then testified that Reynolds stated that the "person who committed this crime, was a black man . . . who lived in the Milton area and . . . was still . . . on the streets and free, coming and going as he pleased", *id.* at 239-40, and that a few days later Reynolds "explained to us that was all he was going to say because he didn't want to be a snitcher." *Id.*at 241.

[3] Cuffee's first version, as told to Detective Wheatley on February 26, 1976, was that those responsible for the Snyder homicide had changed clothes in Cuffee's house. T.T. at 379-80. Cuffee's second story to Wheatley was that the subjects had hidden in the bathroom next door. *Id.* at 380. In a subsequent interview, Cuffee told Wheatley that, while Cuffee was "in a room at Draper's," he had seen blood on Young's and Reynolds' shoes, and that Young had told him that he had hit Snyder in the face with a baked bean can. *Id.* at 384-86. Version four was that Cuffee had returned home from a shopping trip to find ashes of burned clothing in his bathtub, after which Young had appeared, wearing a bloody T-shirt and asking to

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Cuffee's prior inconsistent statements. T.T. at 379-89. These statements were apparently introduced by the prosecution at trial as substantive evidence against Reynolds, pursuant to a Delaware hearsay exception.[4]

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borrow a shirt. *Id.* at 387. At Reynolds' trial, Detective Wheatley, testifying for the defense, recounted all four of Cuffee's versions.

A tape of a February 26, 1976, interview between Detective French of the Delaware police and Cuffee was also played at Reynolds' trial. T.T. at 396-441. The first version on the tape was that, while Cuffee was shooting pool, he had overheard an argument between two people "who came to this camp with blood on them." App. at 120-21; T.T. at 398-417. Cuffee's next version was that he had been told by an unknown person that Reynolds had driven the car to Snyder's store on the day of the murder. App. at 117; T.T. at 432. His final version was that Reynolds himself had told Cuffee that he was the driver of the car. App. at 125; T.T. at 437.

[4] This exception provides that

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.
>
> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness's in-court testimony is consistent with the prior statement or not.

Del. Code Ann. tit. 11, § 3507 (1987).

The taped interview between French and Cuffee was introduced by defense counsel, probably to rebut Cuffee's testimony. The judge did not give a limiting instruction as to the use of this tape solely to impeach Cuffee's credibility. Similarly, Wheatley's testimony was introduced by the defense without a request for limiting instruction.

However, Cuffee himself would only testify affirmatively at trial to two events: that Young, in Reynolds's presence, had asked Cuffee if he wanted "to rip somebody off," and that Cuffee had seen Young, who was wearing a bloody shirt, with Reynolds in a car on the day of the murder. App. at 98-106; T.T. at 272-74, 276, 295-96, 299, 319-21, 325. The judge instructed the jury to disregard as hearsay Cuffee's testimony regarding Young's statement to Cuffee.[5] *Id.* at 274. The final jury instructions did not include the standard admonition that opening and closing statements are not to be regarded as evidence. Reynolds was convicted on June 15, 1977 of first degree murder, first degree robbery and second degree conspiracy.[6]

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[5] Cuffee subsequently repeated several times, however, that it was Young, not Reynolds, who had asked him to participate in the robbery. This testimony was elicited on both direct and cross-examination. There were no further objections on hearsay grounds to this testimony, and the trial court did not give additional instructions.

[6] Proceedings against Rooks did not proceed as expeditiously. After two pretrial appeals by the government to the Delaware Supreme Court failed to overturn the trial judge's ruling that Reynolds' confessions of March 28 and 31, 1976 were involuntary and therefore not admissible, State v. Rooks, 411 A.2d 316 (Del. 1980); State v. Rooks, 401 A.2d 943 (Del. 1979), the trial judge directed a verdict of acquittal.

Young was convicted by a jury and his conviction upheld on direct appeal. Young v. State, 407 A.2d 517 (Del. 1979). The trial judge granted, however, his motion for a new trial, based on newly discovered evidence that Miles Cuffee, the chief proscution witness in all three trials, had known nothing about the murder but had testified nonetheless in an attempt to obtain a $2000 reward. State v. Young, No. 77-09-0001-0004, letter op. at 6 (Del. Super. Ct. Oct. 4, 1982). Thereafter, Young entered a plea of guilty to manslaughter.

On direct appeal, the Supreme Court of Delaware remanded the matter to the Superior Court to consider a new trial motion, based on newly discovered evidence that another person may have committed the crime, that had been filed after the notice of appeal.[7] App. at 161. After this new trial motion was denied, Reynolds took another appeal and the conviction was affirmed. *Reynolds v. State*, 424 A.2d 6 (Del. 1980) (*per curiam*).

On June 29, 1982, Reynolds filed a motion for post-conviction relief pursuant to Delaware Superior Court Criminal Rule 35 ("Rule 35").[8] In this motion, Reynolds

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[7] At the trial court hearing on this motion, the chief investigating officer appeared as a defense witness and testified that a fingerprint found near the scene matched those of a person other than Reynolds. The trial judge, however, credited testimony by two other experts that "the controversial fingerprint was of no identification value," and he found that the "evidence as to the [the other suspect's] association at or near the scene of the crime was far less positive than suggested by the motion, and [that] some evidence relating to the [other suspect] and certain minibike tire tracks was in the police record all along. . . ." Reynolds v. State, 424 A.2d 6, 8 (Del. 1980) (*per curiam*).

[8] This provision for post-conviction relief states that

> [a]ny person who has been sentenced by the Court may apply by motion for postconviction relief for any meritorious claim challenging the judgment of conviction including claims: (i) That the conviction was obtained or sentence imposed in violation of the Constitution and laws of this State or the United States; (ii) that the Court imposing the sentence was without jurisdiction

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claimed for the first time that the prosecutor's references to the confessions during his opening statement, coupled with defense counsel's failure to request, and the trial judge's failure *sua sponte* to give, a limiting instruction, or to declare a mistrial, denied Reynolds due process under the Delaware and United States Constitutions. The state opposed the motion on the ground that the claims were procedurally barred by the holding of *Conyers v. State*, 422 A.2d 345 (Del. 1980) (*per curiam*).

The court held two hearings to adjudicate the motion. Reynolds's two trial attorneys, one of whom also represented him on direct appeal, testified at both hearings as to whether they had made deliberate choices not to request a limiting instruction, to move for a mistrial and to raise the issue on direct appeal. App. at 68-85, 292-344. The Delaware Superior Court found that

> where no "contemporaneous objection" is made the holding of the Delaware Supreme Court in *Conyers v. State* . . . requires that the [cause and prejudice] test established by the United States Supreme Court for determining when federal habeas corpus review

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> to do so; or (iii) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law. An application may be filed at any time, provided, however, that postconviction relief shall not be available so long as there is a possibility of taking a timely appeal from the judgment of conviction. . . .The Court need not entertain a second motion or successive motions for similar relief on behalf of the same applicant.

Delaware Superior Court Criminal Rule 35 (1975).

> must be applied when considering a Rule 35 motion . . . .Under the reasoning of *Engle [v. Isaac*, 456 U.S. 107 (1982),] the situation existing here does not constitute cause justifying relief from the failure to make timely objection.

App. at 2-3, 7. It then denied the motion as to all claims. The Delaware Supreme Court, also relying on *Conyers*, affirmed. App. at 9-11.

Reynolds *pro se* filed a second Rule 35 motion on August 19, 1985. This motion specifically alleged ineffectiveness of counsel for failing to object to the opening statement and for failing to move for a mistrial. The Superior Court dismissed the motion as repetitive. Although Reynolds initially appealed this decision to the Delaware Supreme Court, he subsequently and voluntarily withdrew the appeal.

Reynolds then filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Delaware. His petition asserted five grounds for relief: (1) prosecutorial misconduct arising from the prosecutor's reference to Reynolds's confessions in his opening statement; (2) abuse of discretion by the trial judge in failing *sua sponte* to instruct the jury to disregard the prosecutor's reference to the confessions;[9] and (3) ineffective assistance of counsel for failing (a) to object to the opening statement, (b) to

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[9] We must liberally construe *pro se* pleadings. Haines v. Kerner, 404 U.S. 519, 520 (1972) (*per curiam*). While Reynolds currently frames this claim as "abuse of discretion," this clearly would not raise, if interpreted literally, a claim congnizable in federal court. It was raised in the state courts as a federal due process violation, however, and it is so construed here.

move for a mistrial, and (c) to raise the issue on direct appeal. The magistrate to whom the petition was referred concluded that, although the claims had been exhausted, the court was barred by *Sykes* from considering the merits of the first two claims. App. at 17. The magistrate did reach the merits of the ineffectiveness of counsel claims and recommended that the writ be denied as to those claims. *Id.* at 17-19. The district court adopted the magistrate's report and denied the petition. This appeal followed.

II.

Reynolds's claims implicate the due process concern of whether the trial court "fail[ed] to observe that fundamental fairness essential to the very concept of justice."[10]

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[10] The weakness of the state's case against Reynolds underscores the significance of the prosecutor's reference to Reynolds's confessions. As summarized previously, the evidence introduced against Reynolds consisted entirely of Cuffee's various contradictory statements to the Delaware police. We have no occasion to pass on the constitutionality of the Delaware hearsay exception embodied in Del. Code Ann. tit. 11, § 3507, which allows these prior inconsistent statements to be introduced as substantive evidence against criminal defendants. The issue was not raised in any forum, state or federal, and we note that "evidentiary errors of state courts are not considered to be of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives a defendant of fundamental fairness in his [or her] criminal trial." Bisaccia v. Attorney General of New Jersey, 623 F.2d 307, 312 (3d Cir.), *cert. denied*, 449 U.S. 1042 (1980). Nevertheless, we do observe that Cuffee's only *trial* testimony was to the effect that he saw Reynolds and Tucker in a car on the day of the murder and that Tucker's shirt had blood on it. Moreover, Cuffee's testimony is certainly brought into doubt by the Superior Court's ruling in State v. Young, which granted co-defendant Young a new trial based on the lack of credibility of Cuffee's testimony.

Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974) (citations omitted). As the district court recognized, however, a federal court must assure itself that a habeas petitioner has complied with relevant state procedural requirements before it can delve into claims of constitutional error in a state conviction. We thus apply the United States Supreme Court's holding in *Wainwright v. Sykes*, 433 U.S. 72 (1977). The *Sykes* Court held that a habeas petitioner's failure to comply with a state procedural requirement that a suppression motion be made prior to trial prevented the federal courts from reaching the merits of a claim that the confession was improperly obtained. *Id.* at 87. In considering "the adequacy of [Florida] state [procedural] grounds to bar federal habeas review," *id.* at 81, the *Sykes* Court relied on three factors: (1) that the state rule "in unmistakable terms and with specified exceptions require[d] that the motion to suppress be raised before trial," *id.* at 85; (2) that "all of the Florida appellate courts refused to review petitioner's federal claim on the merits after his trial," *id.*; and (3) that "their action in so doing [wa]s quite consistent with a line of Florida authorities interpreting the rule in question as requiring a contemporaneous objection." *Id.* at 85-86. The Supreme Court therefore concluded that the requirement constituted "an independent and adequate state procedural ground" barring review of the claim by federal courts. *Id.* at 87.

The *Sykes* Court went on to hold that federal courts must employ a "cause and prejudice" standard to judge whether a waiver of claims in the state court should be overlooked in federal court. *Sykes*, 433 U.S. at 87. Under this test, a defendant must show "cause" for non-compliance with the procedural rule and make "some showing

of actual prejudice resulting from the alleged constitutional violation."[11] *Id.* at 84.

The application of *Sykes* requires a three–not two–part analysis. Before a court may apply the cause and prejudice standard, it must resolve in the affirmative the question of whether the purported state procedural bar is "independent and adequate." In *Sykes*, the Supreme Court considered the adequacy and independence of a state procedural requirement as a matter of federal law and, in fact, it implicitly rejected the finding of a Florida court "that the admissibility of the [claims] had been raised and decided on direct appeal." 433 U.S. at 75 n.3. In decisions following *Sykes*, the Court has always prefaced an inquiry into procedural default with an examination of the state procedure itself. *County Court of Ulster County v. Allen*, 442 U.S. 140, 149 (1979) (*"Ulster County"*), is the most dramatic example of this type of analysis. The

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[11] As noted recently, the *Sykes* Court

> explicitly rejected the standard described in Fay v. Noia, 372 U.S. 391 (1963), under which a federal habeas court could refuse to review a defaulted claim only if "an applicant ha[d] deliberately by-passed the orderly procedure of the state courts" . . . by personal waiver of the claim amounting to " 'an intentional relinquishment or abandonment of a known right or privilege.' " . . . At a minimum, then, Wainwright v. Sykes plainly implied that default of a constitutional claim by counsel pursuant to a trial strategy or tactical decision would, absent extraordinary circumstances, bind the habeas petitioner even if he [or she] had not personally waived that claim.

Murray v. Carrier, ___ U.S. ___, 106 S. Ct. 2639, 2644 (1986) (citations omitted).

Court scrutinized New York's statutes and common law to determine whether that state had a contemporaneous objection procedure that applied to the specific facts before it. In gauging the adequacy and independence of the alleged procedural bar, the Court rejected several contentions that were advanced by the Attorney General of New York[12] and examined in detail New York's "cautious contemporaneous objection policy . . . embodied in N.Y. Crim. Proc. Law § 470.05(2) (McKinney 1971)." 442 U.S. at 150-51 & nn. 8-10. All nine Justices agreed that there was "no support in either the law of New York or the history of th[at] litigation for an inference that the New York courts decided respondents' constitutional claim on a procedural ground." *Id.* at 149. The Court therefore proceeded to the merits of the claim. *Cf. Murray v. Carrier*, ___ U.S. ___, 106 S. Ct. 2639, 2642-43 (1986) (discussing Virginia Supreme Court Rule 5:21); *Reed v. Ross*, 468 U.S. 1, 7-8 & n 5 (1983) (discussing North Carolina requirements); *Engle v. Isaac*, 456 U.S. 107, 124-25 & nn. 26-27 (1982) (discussing Ohio Rule of Criminal Procedure 30).

We must determine whether the district court correctly relied upon *Conyers v. State*, 422 A.2d 345 (Del.

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[12] These contentions included (1) the fact that the claim was raised for the first time via post-trial motion, *Ulster County*, 442 U.S. at 148; (2) the fact that two state courts did not explicitly state that they were rejecting the claim on its merits, *id.*; (3) the rejection on procedural grounds by New York's highest court of an unrelated state law claim, *id.* at 148 n.6; (4) failure of trial counsel to request a jury determination of the claim, *id.* at 148-49 n.6; and (5) failure to apply for a petition for writ of certiorari to the highest state court. *Id.* at 149 n.7.

1980) *(per curiam)*, as an "independent and adequate state procedural ground," *Sykes*, 433 U.S. at 87, that bars federal habeas review. In *Conyers*, the Delaware Supreme Court explicitly adopted the *Sykes* cause and prejudice test and applied it for the first time to a state post-conviction proceeding under Rule 35. At issue in *Conyers* was the defendant's failure to move for suppression of evidence before or during trial, as required by Delaware Superior Court Criminal Rule 41(e) ("Rule 41(e)").[13] The Delaware Supreme Court stated that the *Sykes* "test gives proper deference to the important State interests sought to be advanced by Rule 41(e)'s contemporaneous objection requirement . . . while affording an adequate safeguard that the Rule will not be permitted to result in a miscarriage of justice to a defendant who has failed to comply therewith." *Conyers*, 422 A.2d at 346.

By applying the *Sykes* cause and prejudice standard to suppression issues raised for the first time in a state post-conviction motion pursuant to Rule 35, the Delaware Supreme Court imposed upon Rule 35 a provision found in some other states' post-conviction proceedings, *i.e.*, a

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[13] This Rule provides that

> [a]n application . . . to suppress for use as evidence anything obtained as a result of an unlawful search and seizure shall be made by motion. . . .The motion shall be made before the trial or hearing in which the property seized may be used as evidence, unless opportunity therefor did not exist or the moving party was not aware of the grounds for the motion; but the Court in its discretion may entertain the motion at the trial or hearing.

Delaware Superior Court Criminal Rule 41(e)(1975).

requirement that all issues should be raised at the first possible opportunity unless the petitioner can demonstrate reasons to rebut or excuse the presumptive waiver. *See, e.g.*, 42 Pa. Cons. Stat. Ann. § 9544 (Purdon 1982);[14] N.J.R. 3:22-4 (1988).[15] Unlike the laws governing post-conviction proceedings in the other states within this

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[14] This Pennsylvania statute provides that

an issue is waived if:

> (1) The petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted or in a prior proceeding actually initiated under this subchapter.
>
> (2) The petitioner is unable to prove the existence of extraordinary circumstances to justify his [or her] failure to raise the issue.

42 Pa. Cons. Stat. Ann. § 9544 (Purdon 1982).

[15] This New Jersey Court Rule provides that

> [a]ny ground for relief not raised in a prior proceeding under this rule, or in the proceedings resulting in the conviction, or in a post-conviction proceeding brought and decided prior to the adoption of this rule, or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds (a) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or (b) that enforcement of the bar would result in fundamental injustice; or (c) that denial of relief would be contrary to the Constitution of the United States or the State of New Jersey.

N.J.R. 3:22-4 (1988).

judicial Circuit, however, Rule 35 on its face states no procedural limits to its application except that "postconviction relief shall not be available so long as there is a possibility of taking a timely appeal from the judgment of conviction."

It is ironic that Delaware's courts have imposed a procedural bar on themselves, based on a line of cases that tortuously distinguishes between situations where a federal court can review claims arising from state convictions and those where that same federal court must defer out of comity to state court adjudication of the claims. *See Sykes*, 433 U.S. at 78-85. As a matter of state law, this unexpected application of *Sykes* is, of course, not our concern. As a matter of federal law, however, it raises extremely troubling questions. The Supreme Court "ha[s] consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question," *Henry v. Mississippi*, 379 U.S. 443, 447 (1965), and *Sykes* itself left the exact ambit of the cause and prejudice standard "open for resolution in future decisions." 433 U.S. at 87. To decide whether *Conyers* provides an "independent and adequate" basis for precluding federal habeas review of Reynolds's claims, we turn to the three factors upon which the Supreme Court relied to so decide in *Sykes*, to wit: whether the state procedural requirement is stated in "unmistakable terms," whether the state courts have refused to review the claims on the merits, and whether the state courts' refusal in this instance is "consistent" with other state decisions. *Id.* at 85-86.

Notwithstanding the Delaware courts' refusal to consider the merits of Reynolds's claims, we find that the *Conyers* decision does not constitute an "independent and adequate state procedural ground" barring federal courts from habeas review of the due process claim raised here. No specific Delaware procedural rule governs, in "unmistakable terms," *Sykes*, 433 U.S. at 85, the precise claim raised in Reynolds's Rule 35 motion, namely, that due process was denied by the prosecutor's over-reaching coupled with the absence of the judge's *sua sponte* limiting instruction or declaration of mistrial. In addition, the Delaware courts' invocation of *Conyers* is not consistent with other state authority. Thus, of the three elements that could support a conclusion that this state procedural requirement is "adequate" to preclude federal review, two are blatantly missing here.

A.

We can neither find a Delaware rule governing the specific claims raised by Reynolds in his habeas petition nor can we read *Conyers* as creating one. Delaware has no general contemporaneous objection rule. Rule 41(e), which governs the time for making suppression motions, is not relevant here. The language of Rule 41(e)'s "contemporaneous objection" requirement is mandatory; the time for making the motion is explicitly articulated and any deviation therefrom is within the trial court's discretion. Thus Rule 41(e) arguably serves as an "independent and adequate" procedural ground within the meaning of *Sykes* so as to justify the result in *Conyers*. Before us now, however, is not a violation of Rule 41(e), but a very different circumstance: prosecutorial over-reaching caused by the withdrawal of the offer of two confessions

during a suppression hearing after the prosecutor had already referred to them extensively in his opening statement, and the subsequent failure of the trial court to issue a cautionary instruction.

The state never argued that Reynolds failed to make a Rule 41(e) motion, nor did it point to a rule that might arguably serve as a proxy for Rule 41(e) in Reynolds's case. During Reynolds's Rule 35 proceedings, the Delaware Attorney General alleged that

> [t]hree prior procedures were not utilized by Reynolds. Initially, Reynolds, during trial, when the statements were excluded, made no motion for a mistrial. By mere definition, that motion, as it acts to withdraw the case from the jury, must be made contemporaneously with the damaging error. Secondly, [Delaware] Super. Ct. Crim. R. 33, while not speaking to trial motions, clearly requires that motions for new trial, based on trial error, be asserted no later than 10 days after the rendition of the verdict. Reynolds made no such motion asserting error in the prosecutor's opening remarks in such a timely fashion. Finally, Reynolds did not assign this claim as error in his appeal to the Delaware Supreme Court.

State's post-evidentiary hearing memorandum on defendant's motion for post-conviction relief at 27. However, Delaware Superior Court Criminal Rule 33, which governs motions for a new trial, does not articulate a waiver rule for claims not raised by this motion. Furthermore, *Conyers* did not, in "unmistakable terms," bar claims that could have been presented in a motion for new trial or on direct appeal. Nor does *Conyers* mention a general contemporaneous objection requirement that might apply to motions for mistrial.

No published decision of the Supreme Court of Delaware after *Conyers* has explicitly stated that the cause and prejudice standard is to be applied in Rule 35 proceedings to any claims other than Rule 41(e) claims, and we cannot read *Conyers* as creating such procedural bars. The language of *Conyers* does not contain even the slightest suggestion that its holding extends beyond suppression motions that were not timely made pursuant to Rule 41(e). The *Conyers* analysis is clearly derived from the existence of a contemporaneous objection rule with respect to suppression motions; it relied on *State v. Herhal*, 307 A.2d 553 (Del. Super. 1973), as support for its holding that Rule 41(e) embodies a contemporaneous objection requirement. A subsequent decision only extended the reach of *Conyers* to include situations in which a suppression motion had been made at trial but not raised on direct appeal. *Johnson v. State*, 460 A.2d 539 (Del. 1983).

This is not to say that federal courts will never defer to announcements by state courts or legislatures of new rules of procedure that must be followed in post-conviction proceedings. Where a purported new, sweeping procedural requirement is not even explicitly formulated in the opinion upon which the state courts rely to deny review, however, it lacks the requisite degree of specificity and clarity -- in short, the "unmistakable terms"-- necessary to bar federal courts from habeas review. Whether enunciated by court rule or case law, there is no Delaware procedural rule on point, and therefore Reynolds violated none.

B.

Turning to the question of whether the Delaware courts' application of *Conyers* to Reynolds's post-conviction proceedings is consistent with other state authorities, there does not appear to be significant case law regarding the application of procedural bars to Rule 35 motions prior to *Conyers*. *See Herhal*, 307 A.2d at 555 (reaching merits of Rule 35 claim despite possible procedural bar); *Curran v. State*, 122 A.2d 126, 128 (Del. 1956) (same). The history of Rule 35 itself belies the sweeping conclusion that a procedural bar exists to all claims raised for the first time in a Rule 35 motion. The seminal Delaware case explaining Rule 35 involved petitioners who had not taken a direct appeal but who had filed, six years after their convictions, petitions for writ of habeas corpus alleging that their convictions were obtained in violation of the Delaware and United States Constitutions. *Curran v. Woolley*, 104 A.2d 771 (Del. 1954). In denying the writs, the Delaware Supreme Court explained that the writ was historically confined in Delaware to inquiries into the jurisdiction of the sentencing court. Noting the increasing willingness of federal courts to examine state convictions for possible violations of the Constitution or laws of the United States, the Delaware court stated that Rule 35, in contrast to the common law writ of habeas corpus, existed to

> provide an adequate procedure to give a person deprived of his [or her] freedom the opportunity to have the intrinsic fairness of the criminal process under which he [or she] is committed examined into [by the Delaware courts]. . . .Under this rule, any prisoner who claims to have been imprisoned in violation of his [or her] federal constitutional rights

> may, by motion at any time, move to vacate, set aside or correct his, [or her] sentence. . . .

Curran, 104 A.2d at 774. The court did not comment on petitioners' failure to take a direct appeal.[16]

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court held that a state procedural bar would not be considered independent and adequate where the criminal defendant

> could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart [federal] review . . . applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

Id. at 457-58; *accord James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Barr v. Columbia*, 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 301 (1964); *Wright v. Georgia*, 373 U.S. 284, 290-91 (1963). Rule 35, until *Conyers*, could fairly be read as providing for review of claims that are raised for the first time by post-conviction motion. Indeed, in *Bailey v. State*, 422 A.2d 956 (Del. 1980), which was decided the same year as *Conyers*, the Delaware Supreme Court even adjudicated the merits of claims raised for the first time in a Rule 35 motion. *Id.* at 963-64. As the Court of Appeals for the Eleventh Circuit recently stated, "[w]here the state applies its procedural

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[16] In Gural v. State, 243 A.2d 692 (Del. 1968), the Delaware Supreme Court denied a petitioner's request to have his Rule 35 motion treated as a direct appeal and stated that its review was limited to the Superior Court's denial of the motion. *Id.* at 693-94. In *Gural*, as in *Curran*, no mention was made of procedural bar. *Accord* Priest v. State, 227 A.2d 576 (Del. 1967).

bar only sporadically," *Oliver v. Wainwright*, 795 F.2d 1524, 1529 (11th Cir. 1986), a federal habeas court may go to the merits of the claim.

Moreover, under Superior Court Rule 52[17] and Supreme Court Rule 8[18], the Delaware Supreme Court routinely considers claims raised for the first time on direct appeal, if the claims present fundamental constitutional problems. *See Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (fifth amendment); *Van Arsdall v. State*, 486 A.2d 1, 11n.4 (Del. 1984) (fourteenth amendment); *Passerin v. State*, 419 A.2d 916, 922 (Del. 1980) (fourth amendment); *Henson v. State*, 332 A.2d 773, 774 (Del. 1975) (sixth amendment); *but see Wright v. State*, 374 A.2d 824, 831 (Del. 1977) (refusing to reach meritless fifth amendment claim). It is not clear if any differences existed in the lenient waiver rules for claims on direct appeal

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[17] Rule 52 defines

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

Delaware Superior Court Criminal Rule 52 (1987).

[18] Rule 8 defines "Questions Which May Be Raised on Appeal:"

> Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.

Delaware Supreme Court Rule 8 (1987).

and waiver rules for Rule 35 claims prior to *Conyers*. *Cf. Spencer v. Kemp*, 781 F.2d 1458, 1469 (11th Cir. 1986) *(en banc)* (refusing to hold petitioner to stricter direct appeal waiver rules). In at least one Rule 35 appeal decided in the same year as *Conyers*, however, the Delaware Supreme Court considered the merits of a claim that had neither been preserved at trial nor raised on direct appeal. *Bailey*, 422 A.2d at 963-64 (finding sixth amendment claim harmless beyond a reasonable doubt). This lack of consistency in the application of waiver rules on direct appeal and in Rule 35 proceedings provides an additional strand of support for our conclusion that *Conyers* is not an "independent and adequate" procedural bar governing Reynolds's claims. *But cf. Engle v. Isaac*, 456 U.S. 107, 135 n.44 (1982) ("States have the primary responsibility to interpret and apply their plain error rules.")

In addition, at least two other Courts of Appeals have stated "that federal courts should generally determine questions of procedural default according to the habeas waiver law in effect at the time of the asserted waiver, and that retroactive effect should not be given to such statutes." *Spencer*, 781 F.2d at 1469 (citations omitted); *accord Lumpkin v. Ricketts*, 551 F.2d 680, 682 & n.2 (5th Cir.), *cert. denied*, 434 U.S. 957 (1977). Even if we were to conclude that a new Delaware procedural rule was created by *Conyers*, we could not also conclude that the rule barred collateral federal review, where it was applied to claims other than Rule 41(e) claims for the first time in the instant case.

The application of the *Conyers* rule by the state courts to Reynolds's claims is not "consistent with a line of

[state] authorities interpreting the rule in question as requiring a contemporaneous objection. . . ." *Sykes*, 433 U.S. at 85-86. In fact, there is a tangible absence of both consistency and state authority here. We must conclude that there is no support for the existence of an "independent and adequate" state procedural requirement, based on the *Sykes* factor of consistency of application.

C.

The Delaware courts' repeated application of the *Conyers* holding to Reynolds's claims might persuade us that *Conyers* is an "independent and adequate" rule precluding federal habeas review, were it not for the two countervailing considerations analyzed above.[19] In finding the absence of a procedural bar here, we note that, although "it is a well-established principle of federalism that a state decision resting on an adequate foundation of state *substantive* law is immune from review in the federal courts," *Sykes*, 433 U.S. at 81 (emphasis added), *Sykes* itself noted that federal courts have not deferred so automatically to state procedural bars. A habeas petitioner's non-compliance with a purported state procedural rule should not obscure the pre-requisite that the rule itself be "independent and adequate" as a matter of federal law. Although *Sykes* instructed federal courts to accord greater deference to state procedural bars than had been required by the *Fay v. Noia* deliberate bypass test, it did not immunize these requirements from scrutiny. Such scrutiny is

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[19] We note that in the obverse situation, that is, where state courts have *not* refused on procedural grounds to review the merits of a claim, this Court will reach the merits of the claims. Hochman v. Rafferty, 831 F.2d 1199, 1203 (3d Cir. 1987).

particularly appropriate where, as here, the claim being raised is a violation of due process that stems not only from the decisions of counsel but also from prosecutorial over-reaching and the failure of the trial court *sua sponte* to give a curative instruction. We thus join other Courts of Appeals that have reviewed the merits of claims raised in a habeas petition notwithstanding the presence of a state's procedural bar, after determining that the state procedures lacked sufficient independence and adequacy.[20] *See, e.g., Wheat v. Thigpen*, 793 F.2d 621, 625-27 (5th Cir. 1986); *Spencer v. Kemp*, 781 F.2d 1458, 1469-71 (11th Cir. 1986) *(en banc); Hawkins v. LeFevre*, 758 F.2d 866, 872-74 (2d Cir. 1985); *but see Runnels v. Hess*, 653 F.2d 1359, 1363 (10th Cir. 1981).

III.

The district court denied on their merits Reynolds's claims of ineffectiveness of counsel. These claims focused upon the trial attorneys' failure to request a limiting instruction or a mistrial and appellate counsel's failure to raise the issue of the opening statement on direct appeal.

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[20] If federal courts decline to review claims of constitutional error because state courts refuse review based upon procedural grounds, and state courts refuse to review such claims because federal courts may refuse out of comity, then the cause and prejudice standard will ultimately be transformed into a "comity of errors." Burkett v. Cunningham, 826 F.2d 1208, 1218 (3d Cir. 1987). *Sykes* was never intended to impose additional limits on *states'* review of federal constitutional claims. "Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.' " Rose v. Lundy, 455 U.S. 509, 518 (1982) (citing Ex parte Royall, 117 U.S. 241, 251 (1886)).

We find that two of the three ineffectiveness of counsel claims may not have been exhausted. We therefore will vacate the district court's order insofar as it denies these claims on the merits and remand for further inquiry into the issue of exhaustion.

A rule 35 motion is the proper vehicle by which to bring ineffectiveness of counsel claims before the Delaware courts. *See Collins v. State*, 420 A.2d 170 (Del. 1980); *Casalvera v. State*, 410 A.2d 1369 (Del. 1980). However, in the briefs to the Superior Court on the first Rule 35 motion, as well as on appeal from the denial of that motion to the Delaware Supreme Court, Reynolds framed his arguments solely in due process terms, referring both to the United States and Delaware Constitutions. Although the statement of the issue presented referred to counsel's failure to request a mistrial, no reference was made in the brief to counsel's failure to request a limiting instruction or to raise the issue on direct appeal. Nor was mention made in the brief of *Strickland v. Washington*, 466 U.S. 668 (1984), or of violations of Reynolds's sixth amendment right to counsel. While discussing counsel's performance at length, the Superior Court and the Supreme Court opinions focused only upon the *Sykes* cause and prejudice issue, and they never addressed ineffectiveness of counsel under *Strickland*.

The motives of Reynolds's two trial attorneys, one of whom also represented him on direct appeal, were fully explored during the two hearings held in connection with the first Rule 35 motion. Thus, it is possible that all the evidence relevant to a determination whether counsel's performance "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, has been

adduced already. Neither state court made an explicit finding, however, regarding this issue.

After the first round of Rule 35 proceedings, Reynolds filed a *pro se* Rule 35 motion in Delaware Superior Court alleging, *inter alia*, that his trial counsel was ineffective for failing to request a mistrial or limiting instruction. He did not, however, include a claim of ineffectiveness of appellate counsel for failure to raise the claim on direct appeal. The Superior Court denied the motion as repetitive. *State v. Reynolds*, No. IS76-04-0026, 0027, letter op. at 2 (Mar. 12, 1986); *see* Del. Super. Ct. Crim. Rule 35(a). On March 26, 1986, five days before he filed his petition for writ of habeas corpus in federal district court, Reynolds withdrew his appeal from the denial of the second Rule 35 motion to the Supreme Court.

Case law on successive motions under Rule 35 is scant. *See, e.g., United States ex rel. Winsett v. Anderson*, 320 F. Supp. 784 (D. Del. 1970). It is at least plausible that the Delaware Supreme Court might have entertained the appeal from the denial of the second Rule 35 motion, if only to review for abuse of discretion the trial court's dismissal of the motion as repetitive. *Hinckle v. State*, 189 A.2d 432, 434 (Del. 1963). It is also possible that the Delaware Supreme Court might reinstate the appeal *nunc pro tunc*, should Reynolds make that request in the future. Moreover, the claim that counsel's failure to raise the issue on direct appeal constituted ineffective representation has not been presented to the state courts at all. It is conceivable that this claim might be considered by the state courts on the merits if it were raised in another Rule 35 motion. "At least where a fair reading of the state post-conviction relief statute indicates that a state court

might well entertain . . . claims . . . , and in the absence of a state court decision clearly foreclosing such a result, we cannot conclude that petitioner has demonstrated compliance with the exhaustion requirement. *"Santana v. Fenton,* 685 F.2d 71, 75 (3d Cir. 1982). The question whether Reynolds had exhausted these claims at the time he filed the instant petition, or whether "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner," 28 U.S.C. § 2254(b) (1982), was not explored by the district court. *See also Santana,* 685 F.2d at 74-75.

Even if Reynolds demonstrates that state remedies were unavailable at the time he filed the petition, his withdrawal of the appeal from the denial of the second Rule 35 motion might then "constitute[] a procedural default that deprived the highest state court of an opportunity to consider his constitutional claim[]" of ineffectiveness of counsel for failure to request a limiting instruction or mistrial. *Beaty v. Patton,* 700 F.2d 110, 112 (3d Cir. 1983) *(per curiam).* These claims would then be subject to the "cause and prejudice" analysis of *Sykes.*[21]

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[21] *Sykes* had left open the question whether *Fay's* deliberate bypass test was still applicable to decisions whether to appeal. In *Beaty,* this Court held that, because of habeas petitioner's failure to file an appeal of the denial of a post-conviction petition to the highest Pennsylvania court, he "must demonstrate that this default was not a 'deliberate bypass' of the state court . . . because his default involved a decision regarding an appeal." 700 F.2d at 113 (quoting Fay v. Noia, 372 U.S. 391 (1963)). The Supreme Court has since made it clear, however, "that the cause and prejudice test applies to defaults on appeal as [well as] to those at trial." *Carrier,* 106 S.Ct. at 2647.

Under *Rose v. Lundy*, 455 U.S. 509 (1982), a petition containing both exhausted and unexhausted claims must be dismissed. *Id.* at 522. If Reynolds, on remand, can demonstrate that he has exhausted state remedies, and that his waiver of his ineffectiveness claims meets the *Sykes* "cause and prejudice" standard, however, then the merits of all the claims raised in the instant petition may be reached.[22] Because there are unresolved issues whether the claims of ineffectiveness of counsel were fully exhausted and, if so, whether they are procedurally barred, we will vacate the district court's denial of the petition on the merits of these claims and remand for further proceedings.[23]

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[22] Reynolds has another option, of course. *Rose* suggests that a habeas petitioner may choose to "proceed only with his exhausted claims and deliberately set[] aside his unexhausted claims. . . ." 455 U.S. at 520-21. Therefore, if the district court on remand allows Reynolds to amend his petition to drop the unexhausted claims, the court could then proceed to the merits of the exhausted claims.

[23] We recognize that, where the State has not raised non-exhaustion as a defense and where there are no "unresolved question[s] of fact or of state law [that] might have an important bearing" on the claims, Granberry v. Greer, ___ U.S. ___, 107 S. Ct. 1671, 1675 (1987), we can reach the merits of the unexhausted claims. However, we feel that a remand to the district court for determination of all unresolved issues, including exhaustion, is appropriate in this case.

IV.

For the foregoing reasons, we will vacate the order of the district court and remand this matter for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5633

GEORGE L. REYNOLDS,

Appellant

v.

JACK C. ELLINGSWORTH, WARDEN and
CHARLES M. OBERLY, III

On Appeal from the United States District
Court for the District of Delaware
(D.C. Civil Action No. 86-0412 [§ 2254])

Argued November 30, 1987

Before: WEIS, HIGGINBOTHAM and
MANSMANN, *Circuit Judges.*

(Filed March 31, 1988)

ORDER AMENDING OPINION

It is ORDERED that the slip opinion of this Court filed March 31, 1988, be amended as follows:

(1) On page 25, first full paragraph, lines 15 and 16, the words *"of Strickland v. Washington,* 466 U.S. 668 (1984), or" be deleted;

(2) On page 25, first full paragraph, line 17, the words "effective assistance of" be inserted after "right to";

(3) On page 25, first full paragraph, line 21, the words "*v. Washington*, 466 U.S. 668 (1984)" be inserted after "*Strickland*";

(4) On page 27, footnote 21, line 9, the words " "that the" be replaced by " "the";

(5) On page 27, footnote 21, line 9, the words "that although "counsel's decision not to take an appeal *at all* might [still] require treatment under [the *Fay*] standard," *Carrier* 106 S. Ct. at 2648 (emphasis added)," be inserted after "however,";

(6) On page 27, footnote 21, lines 10-11, the words "*Carrier*, 106 S. Ct. at 2647." be replaced with "*Id.* at 2647. We find that the situation here falls in the latter category.";

BY THE COURT,

/s/ A. Leon Higginbotham, Jr.

Circuit Judge

DATED: April 14, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5633

GEORGE L. REYNOLDS,
Appellant

v.

JACK C. ELLINGSWORTH, WARDEN and
CHARLES M. OBERLY, III

On Appeal from the United States District
Court for the District of Delaware
(D.C. Civil Action No. 86-0142 [§ 2254])

Argued November 30, 1987

Before: HIGGINBOTHAM and MANSMANN and
WEIS,* *Circuit Judges.*

(Filed May 24, 1988)

SUR DENIAL OF REHEARING

PER CURIAM:

In their petition for rehearing, appellees raise three points that merit discussion. First, they argue that

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* At the time of oral argument on this appeal, Honorable Joseph F. Weis, Jr. was an active circuit judge. Judge Weis has since taken senior judge status.

Delaware Superior Court Criminal Rule 51[1] acts as a procedural bar to claims raised for the first time in a proceeding brought pursuant to Delaware Superior Court Criminal Rule 35, where counsel had made a tactical choice not to object at trial or to present the issue on appeal. We cannot read this specific requirement into the general language of *Conyers v. State*, 422 A.2d 345 (Del. 1980) (per curiam). *Conyers* does not refer to, or rely upon, Rule 51. The other cases upon which appellees rely in support of this argument, *see King v. State*, 239 A.2d 707, 708 (Del. 1968) (per curiam); *State v. Herhal*, 307 A.2d 553, 555 (Del. Super. 1973), also fail to discuss the effect of Rule 51 on post-conviction proceedings. In fact, the Delaware courts in *King* and *Herhal* go to the merits of the claims raised, after raising the possible waiver problem. Therefore, to the extent that a waiver rule pursuant to Rule 51 was impliedly articulated in these cases, the procedural default was nonetheless overlooked.

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[1] This rule provides that:

> Exceptions to rulings or orders of the Court are unnecessary and for all purposes for which an exception has heretofore been necesary it is sufficient that a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and the grounds therefor. Where justice requires the Court may relieve a party from the consequences of failure to assign the proper reasons in support of an objection. If a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Del. Super. Ct. R. Crim. Pro. 51 (1974).

Second, appellees bring to our attention the existence of some twenty unpublished opinions of the Delaware Supreme Court that apply the *Conyers* holding to a variety of claims raised in Rule 35 proceedings. While under Delaware law, such orders have precedential value, *see New Castle County v. Goodman*, 461 A.2d 1012, 1013 (Del. 1983), we need not decide the significance of their precedential value here. Each of the cases raised in the petition was decided after Reynolds's trial and direct appeal. Therefore, none of them bear on the question of whether, at the time of the purported waiver in this case, Delaware had a rule that barred claims from being raised for the first time in a Rule 35 proceeding.[2] As we stated earlier, procedural default is determined by the " 'waiver law in effect at the time of the asserted waiver.' " *Reynolds v. Ellingsworth*, No. 86-5633, slip op. at 22 (3d Cir. Mar. 31, 1988) (citation omitted).

Finally, appellees contend that various other courts of appeals have supported the proposition that sporadic application of procedural rules by state courts should be overlooked by federal courts. *See, e.g., Gardner v. Ponte*, 817 F.2d 183, 188 (1st Cir.), *cert. denied sub nom. Gardner v. Maloney*, ___ U.S. ___, 108 S. Ct. 181 (1987); *Bass v. Estelle*, 705 F.2d 121, 122-23 (5th Cir.), *cert. denied*, 464 U.S. 865 (1983); *Hockenbury v. Sowders*, 620 F.2d 111, 113 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981). To the extent that these cases stand for such a proposition, they are directly

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[2] In any case, this Court's inability to detect any of these cases after exhaustive research illustrates one reason why the adequacy of a state waiver rule that is unarticulated either by court rule or by published opinion is subject to close scrutiny.

contrary to law of this circuit as enunciated in this case and in *Hochman v. Rafferty*, 831 F.2d 1199, 1202-03 (3d Cir. 1987). We reiterate our holding that one factor in determining adequacy of a state procedural rule is whether the state courts consistently apply the rule. *See Wainwright v. Sykes*, 433 U.S. 72, 85-86 (1977).

A True Copy:
Teste:
Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE L. REYNOLDS, Petitioner,	)	
v.	)	Civil Action No. 86-142 - JRR
JOHN C. ELLINGSWORTH, ET AL., Respondents.	)	

FINAL ORDER

This 2nd day of September, 1986 for the reasons stated in the Magistrate's Report and Recommendation, dated July 25, 1986.

Now, therefore, IT IS ORDERED that:

1. The Magistrate's Report and Recommendation is accepted and adopted by the Court.

2. The application for a writ of habeas corpus is hereby denied and the petition is hereby dismissed.

3. No probable cause exists for an appeal.

/s/ Jane R. Roth
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE L. REYNOLDS, Petitioner,	)	
v.	)	Civil Action No. 86-142 JRR
JOHN C. ELLINGSWORTH, ET AL., Respondents.	)	

George L. Reynolds, petitioner, *pro se.*

Loren C. Meyers, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, attorney for respondents.

MAGISTRATE'S REPORT AND RECOMMENDATION

Dated: July 25, 1986

Wilmington, Delaware

/s/ N. Richard Powers
POWERS, U. S. MAGISTRATE

The petitioner in this habeas corpus action, George Lee Reynolds, challenges his state court convictions of murder in the first degree, robbery in the first degree, and conspiracy in the second degree. All three claims raised in the petition relate to the prosecutor's opening remarks to the jury in which he extensively referred to two written confessions made to the police by Reynolds. After the commencement of the trial, an evidentiary hearing was conducted on the defense's motion to suppress the confessions. At the conclusion of the evidentiary hearing and before a ruling by the trial judge, the prosecutor announced he would not introduce the statements

into evidence. Although the reasons articulated by the prosecutor were somewhat vague, it appears that the statements were elicited from Reynolds while he was in prison awaiting trial on other charges and was already represented by counsel on those charges. The prosecutor had concluded from speaking to Reynolds' other counsel that the police did not obtain permission from counsel before interrogating him about the instant charges so that his sixth amendment rights may have been violated by the questioning.

Petitioner's three claims are as follows: (1) misconduct by the prosecutor in referring to the confessions in his opening remarks that were never admitted into evidence; (2) abuse of discretion by the trial judge in failing to *sua sponte* instruct the jury to disregard the prosecutor's reference to the confessions; (3) ineffective assistance of counsel inasmuch as petitioner's trial attorneys failed to move for a mistrial, failed to ask the trial judge for a cautionary instruction to the jury, and failed to raise the issue on direct appeal.

The trial took place in June 1977. Following the conviction, there were protracted post-trial proceedings on matters not related to the issues raised here. Ultimately an appeal was taken and petitioner's conviction was affirmed. Reynolds v. State, 424 A.2d 6 (Del. 1980). In 1982, petitioner filed a motion for post-conviction relief which for the first time challenged the prosecutor's reference to the confessions in his opening statement. After two evidentiary hearings the motion was denied by Judge Taylor without reaching the merits because of petitioner's counsel's tactical decision not to object at trial. The decision was affirmed by the Delaware Supreme

Court. Reynolds v. State, No. 370, 1983 (Del. Jan. 16, 1985). Petitioner then reapplied for post-conviction relief, charging ineffective assistance of counsel and abuse of discretion by the trial judge. The second motion was denied as repetitive under Superior Court Criminal Procedure Rule 35(a). Reynolds lodged an appeal of the latter decision with the Delaware Supreme Court, but voluntarily dismissed the appeal in favor of seeking habeas corpus relief in this Court.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court held that federal habeas corpus review to consider the merits of an alleged *Miranda* violation is unavailable if the defendent failed to abide by the state court's procedural rules for objecting to the introduction of the tainted confession unless there is a showing of both cause and prejudice. In Engle v. Isaac, 456 U.S. 107 (1982), the Court held that a defendant's failure to abide by a state procedural rule for objecting to an unconstitutional jury instruction will bar habeas corpus relief unless there is a showing of cause and prejudice. The essence of petitioner's first two claims is that the prosecutor's improper references to the confessions denied him a fair trial. However I conclude that petitioner has failed to show "cause" for his failure to timely seek a mistrial because of the prosecutor's alleged misconduct, failure to timely request that the trial judge give a cautionary instruction to the jury to disregard the prosecutor's opening remarks, and failure to raise the issue on direct appeal. Consequently this Court is barred from considering the merits of the first two claims in the petition.

The state courts engaged in a *Wainwright v. Sykes*-type analysis and concluded that petitioner had not

shown justifiable cause for the failure to object in a timely manner. That conclusion is not binding on this Court, but the subsidiary or historical factual findings supporting the conclusion are binding on this Court if they have fair support in the record. Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844 (1985); Maggio v. Fulford, 462 U.S. 111 (1983); Sumner v. Mata, 449 U.S. 539 (1981).

Judge Taylor found, based on the testimony of the two defense attorneys, that the failure of counsel to move for a mistrial, to request a cautionary instruction or to raise the issue on direct appeal was a strategic choice. This factual finding has fair support in the record. Although neither attorney could specifically recall his thought process when questioned five years after the event, both indicated they probably did not move for a mistrial because the prosecutor's case, absent the confession, was not a strong one. At that point they were optimistic for an aquittal, and they did not want to give the prosecutor a second opportunity to put his case together and possibly even find a ground for getting the confessions into evidence. As for the failure to request a cautionary instruction from the trial judge, both attorneys testified that since the jury had heard more than a week's worth of testimony since the prosecutor's opening statement, the effect of the remarks had been ameliorated and they did not want to remind the jury just before their deliberations of the promised confessions. With respect to the failure to assert the prosecutor's remarks on direct appeal, the attorney responsible for the appeal gave two reasons. First, having decided as a matter of strategy to keep silent on the matter at the trial, counsel could not very well raise it on appeal. Second, there were several

good grounds for appeal and counsel did not want to dilute the effectiveness of those grounds by raising a weak ground. Although petitioner contends that his attorney's failure to raise the issue at trial or on direct appeal was either inadvertence or lack of knowledge of the applicable law, Judge Taylor concluded otherwise and his finding that a strategic choice was made by counsel is binding on this Court. Since the failure to raise the issue at trial or on direct appeal was the product of a deliberate choice, there has been no justifiable cause shown. Reed v. Ross, 468 U.S. 1, 13-14 (1984). Thus consideration of the merits of these claims is barred by *Sykes* and *Isaac*.

I conclude that it is appropriate to decide the merits of petitioner's ineffective assistance of counsel claim. Although petitioner has never explicitly claimed in state court that his attorneys were ineffective, he did claim that the failure of his attorneys to raise the impropriety of the prosecutor's opening statement at trial or at the appeal stage was either inadvertence or lack of knowledge of the applicable law. This is tantamount to a claim of ineffective assistance of counsel and petitioner thus afforded the state courts a fair opportunity to address the issue. Moreover ineffective assistance of counsel claims are normally pursued in state court in collateral proceedings so that there has been no procedural default in the failure to raise the issue on direct appeal that would bar consideration on the merits. However, after considering the merits of the claim, I conclude that the claim is without merit because the performance of counsel was within the wide range of professionally competent counsel. Strickland v. Washington, 466 U.S. 668, 690 (1984). The reasons for counsel's failure to raise the prosecutor's remarks at trial

and on direct appeal have already been addressed. Since the factual findings of the state court that these were strategic decisions have fair support in the record, they are binding on this Court.

In Strickland v. Washington, *supra*, 466 U.S. at 690-91, the Supreme Court noted that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. In this case, defense counsel provided the reasoning for their decisions not to challenge the prosecutor's remarks either during trial or on direct appeal. While another attorney might have chosen a different strategy during trial, the option chosen by the particular counsel representing petitioner was plausible considering the circumstances. As for the issues to be raised on direct appeal, I agree with counsel that, having chosen as a matter of strategy not to seek relief from the trial court because of the prosecutor's remarks, he could not very well raise that issue on appeal. Also, having concluded that the prosecutor's improper remarks were one of his weaker issues for appeal, defense counsel was not constitutionally required to raise it anyway before the Delaware Supreme Court. Jones v. Barnes, 463 U.S. 745, 751 (1983).[1] Consequently petitioner has not established that his defense counsel was ineffective at trial or on appeal.

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[1] The Delaware Supreme Court's decision on the direct appeal indicates that that issues that were raised by defense counsel were troubling to it, although the bottom line conclusion was that no reversible error occurred. Reynolds v. State, 424 A.2d 6 [(Del. 1980).]

Since this Court will not reach the merits of petitioner's claims that he was denied a fair trial, and since his claim of ineffective assistance of counsel is found here to lack merit, I recommend that the writ be denied and the petition dismissed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5633

GEORGE L. REYNOLDS, Appellant

vs.

JACK C. ELLINGSWORTH, WARDEN and
CHARLES M. OBERLY, III

(D. C. Civil No. 86-142 [§ 2254])

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: WEIS, HIGGINBOTHAM and MANSMANN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel November 30, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered September 3, 1986, be, and the same is hereby vacated and the cause remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

Sally Mrvos
Clerk

March 31, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5633

GEORGE L. REYNOLDS,

Appellant

v.

JACK C. ELLINGSWORTH, WARDEN and
CHARLES M. OBERLY, III

(D.C. Civil Action No. 86-0142 [§ 2254])

SUR PETITION FOR PANEL REHEARING

Present: HIGGINBOTHAM, MANSMANN and WEIS,*
Circuit Judges.

The petition for rehearing filed by the appellees in the above-entitled case, having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,
/s/ A. Leon Higginbotham, Jr.
Circuit Judge

Dated: May 24, 1988

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* At the time of oral argument on this appeal, Honorable Joseph F. Weis, Jr. was an active circuit judge. Judge Weis has since taken senior judge status.

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

GEORGE LEE REYNOLDS,)
Defendant Below,)
Appellant,)
)
v.)
) No. 204, 1979
STATE OF DELAWARE,)
Plaintiff Below,)
Appellee.)

Submitted: October 14, 1980
Decided: December 5, 1980

Before HERRMANN, Chief Justice, and QUILLEN and HORSEY, Justices.

Upon appeal from Superior Court. Affirmed.

Karl Haller (Argued), Assistant Public Defender, Georgetown, for defendant-appellant.

Merritt Burke, III (Argued), Deputy Attorney General, Georgetown, for plaintiff-appellee.

PER CURIAM:

The defendant, George Lee Reynolds, was convicted of murder in the first degree, robbery in the first degree and conspiracy in the second degree. He appeals from the judgment below and from the failure of the Superior Court to grant a new trial on newly discovered evidence. Four matters are raised.

First, the defendant argues that it was error for the Trial Judge to permit a police detective to give an opinion of the significance of the defendant's change in demeanor, so-called "body language", as part of the detective's testimony concerning the interrogation of the

defendant on February 13, 1976. The foundation for any such expert opinion indeed appears extremely thin. But the opinion added little, if anything, to the detective's factual recitation. Moreover, since the detective also noted that the defendant in the same conversation thereafter said he knew who committed the murder, the detective's opinion that the defendant "had some intimate knowledge of the incident" amounted to little more than surplusage. If the opinion evidence was admitted in error, it was clearly harmless. Superior Court Criminal Rule 52(a).

Second, the defendant argues that it was error to exclude the tape recording of a truth serum interview with the defendant. The interview had taken place pursuant to a written pretrial stipulation that included an agreement "[t]hat the results of the sodium penathal [sic] test . . . shall be admissible" at trial.* The defendant, through the administering doctor, offered the results, which were favorable to him, particularly as to his exculpatory denial of his presence at the scene on the date of the crime. The defendant argues that the tape was admissible on the basis of the stipulation and independently admissible under our statute, 11 *Del.C.* § 3507, which provides for the use of a voluntary out-of-court prior statement as affirmative evidence regardless of whether the statement of the declarant is consistent with his in-court testimony.

We agree with the Superior Court that the above quoted language of the stipulation as to "results" did not

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* Sodium amytal was actually used.

include a tape recording of the entire interview and related procedure. Rather, it seems clear that some confirmation or negation of defendant's version of the facts was contemplated. The doctor testified in support of the defendant.

The argued statutory basis for admission is somewhat confusing to deal with in the context of this appeal. Procedurally, insofar as the immediate trial record at the point of the ruling discloses, the statutory basis was not even mentioned until after the ruling on the tape and then counsel's comments were expressly not offered "in the way of further argument." No ruling followed the mention of the statute. Initially the tape had been offered "for the plain pleasure of the jury". Thus, the record indicates that the Trial Judge never expressly ruled on the statutory basis and perhaps he was never asked for a ruling on that narrow point. Substantively, it should be noted that the evidence showed that truth serum produces "a partially sedated state" where "the conscious mind loses the power to monitor, to censor, what is being said." Thus, it is doubtful that a statement made while under the influence of the drug can qualify as a "voluntary out-of-court prior statement" as required by the statute and as " 'the product of a rational intellect and a free will' " as the statute has been construed. *State v. Rooks*, Del.Supr., 401 A.2d 943, 948-49 (1979). It should also be noted that the defendant was given the additional advantage of testimony of the doctor's impression that the defendant was telling the truth. Under the circumstances, there is no reversible error as a result of a failure to admit the tape. See *Eaton v. State*, Del.Supr., 394 A.2d 217, 218-20 (1978).

The final two matters relate to the motion for new trial on the ground of newly discovered evidence. The chief investigating officer at the time of the investigation, who has since retired from the State Police, was instrumental in instituting a posttrial review of the case by the Superior Court and his affidavit formed the basis of the motion for new trial.

The third alleged error was the Trial Court's refusal to qualify the chief investigating officer as a fingerprint expert for the defense during the hearing on the motion for a new trial. It appeared that the officer at one time had taken a multiday course in fingerprint lifting techniques and their classification but, except for this case and frequent lifting, he had never worked with fingerprints or classified them. The cross-examination of the investigating officer with regard to classification of fingerprints demonstrated scant knowledge at best. The ruling denying his expert status was not an abuse of discretion. *Peters v. Gelb*, Del.Supr., 314 A.2d 901, 903 (1973). Moreover, the Trial Judge made it clear that he rejected factually the suggestion that the fingerprint in question was that of the Puerto Rican suggested. There was no error.

Finally, the defendant urges that the Trial Judge abused his discretion in denying his motion for a new trial which was based on newly discovered evidence. While the appearance of the chief investigating officer as a posttrial witness for the defense naturally gives one pause, it is the substance of the newly discovered evidence which must be the focus of the inquiry.

As we understand the evidence, a palm print proved of no identification value, two experts testified that the controversial fingerprint was of no identification value, evidence as to the Puerto Rican's association at or near the scene of the crime was far less positive than suggested by the motion, and some evidence relating to the Puerto Rican and certain minibike tire tracks was in the police record all along and available to the defense at the time of trial. On this record, the denial of the motion for a new trial was not an abuse of discretion. See *State v. Lynch*, Del.Ct. O & T, 128 A. 565 (1925).

The judgment of the Superior Court at trial and the denial of the posttrial motion for a new trial are affirmed.

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	Criminal Action Numbers
GEORGE LEE REYNOLDS,	)	76-04-0026; 0027; 0027A
Defendant.	)	

Submitted: August 31, 1983
Decided: December 9, 1983

Gary A. Myers, Esquire, for the State of Delaware

Robert C. Wolhar, Jr., Esquire, of Wolhar and Moore, for the defendant

ORDER

On Motion Of Defendant For Post-Conviction Relief – Denied

This 9th day of December, 1983:

1. Defendant was convicted of murder in the first degree, robbery in the first degree, and conspiracy in the second degree on June 15, 1977. After sentencing, defendant appealed the convictions to the State Supreme Court. During the pendency of that appeal defendant filed a motion for new trial on the ground of newly discovered evidence and the matter was remanded to this Court for proceedings involving the motion for new trial. After a hearing, this Court denied defendant's motion for a new trial. The Supreme Court affirmed the convictions on December 5, 1980. *Reynolds v. State*, Del. Supr., 424 A.2d 6 (1980). This motion for post-conviction relief was

filed June 29, 1982.[1] Hearings have been held and briefs have been submitted.

2. The issue in this motion is whether the reference by the Deputy Attorney General in his opening statement to a confession[2] by defendant followed by the failure of the Deputy Attorney General to put the confession in evidence during the trial warrants post-conviction relief where the defendant's attorney did not seek a mistrial during the course of the trial. At the outset it is noted that the issue raised herein is subject to a "contemporaneous objection" rule. Cf. *Conyers v. State*, Del. Supr., 422 A.2d 345 (1980); *State v. Herhal*, Del. Super., 307 A.2d 553 (1973). In this case defendant and his attorneys did not object to the Deputy Attorney General's reference to the confession either when it was stated or at any time prior to this motion, five years after his conviction. The parties agree that where no "contemporaneous objection" is made the holding of the Delaware Supreme Court in *Conyers v. State*, supra, requires that the test established by the United States Supreme Court for determining when federal habeas corpus review must be applied when considering a Rule 35 motion. Under that test,

---

[1] Subsequent to the filing of this motion, defendant has filed a motion for a new trial based upon the decision of this Court in *State v. Young*, Del. Super., CrA No. 77-09-0001-0004, O'Hara, J. (Oct. 4, 1982). That motion has been assigned to Judge O'Hara for decision and is not being considered in this Order.

[2] It is not contended that at the time the Deputy Attorney General referred to the confession he did not intend to introduce the confession in evidence.

which is commonly known as a "cause and prejudice" test, collateral review is unavailable where there has been no contemporaneous objection unless the defendant in the criminal proceeding demonstrates (1) "cause" why he should be relieved of the waiver which flows from the failure to make timely objection, and (2) prejudice to him resulting from the challenged matter. Cf. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). In the more recent case of *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) the Supreme Court reaffirmed its adherence to the cause and prejudice test, but inserted the restrictive adjective "actual" as a qualification of the prejudice factor. *Engle* held that futility of presenting an objection "cannot alone constitute cause for a failure to object at trial." *Engle* also observed:

> Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to
>
> [456 US 134]
>
> omit respondents' due process argument while pursuing other avenues of defense. We have long recognized however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default. (Footnotes omitted).

In *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), decided on the same day as *Engle v. Isaac*, supra, the Supreme Court commented on the prejudice aspect of the "cause and prejudice" test, stating that "the degree of prejudice resulting from [the error relied on must] be evaluated in the total context of the events at trial." Further, *Frady* stated that the defendant's burden is to prove that the error relied on "worked to his actual and substantial disadvantge, infecting his entire trial with error of constitutional dimensions."

3. In applying the "cause and actual prejudice" test, the first consideration is whether the facts and circumstances show that there was cause for the failure of the defense to have raised objection by way of a motion for mistrial at the time the Deputy Attorney General announced (outside of the presence of the jury) that he would not seek to introduce defendant's confession which he had referred to in his opening statement. Defendant was represented by two attorneys experienced in the trial of criminal cases. Joseph Hurley, Esquire, defendant's lead counsel, had served as Deputy Attorney General for a number of years and had successfully prosecuted many serious cases. After leaving the Attorney General's office he had represented defendants in various cases involving serious charges, including two murder cases. In this instance he was retained by the Public Defender to represent this defendant. Karl Haller, Esquire, who assisted in the defense in this case had served with the Public Defender's office for approximately 7 years prior to this trial. It is clear from the testimony of the defendant's attorneys that they viewed the announcement of the Deputy Attorney General that

he would not seek to introduce the confession in evidence as a substantial victory and that they desired to push forward to conclude the trial because they then anticipated a verdict in defendant's favor. Defendant's lead trial counsel testified that he did not seek an admonition from the Court for the jury to disregard the Deputy Attorney General's prior reference to the confession because it would only focus attention on the prior references. With reference to his not seeking a mistrial, he testified that he had had no recollection of his mental processes. However, he testified, based upon his experience, that after two or three days of trial a jury forgets what was said in an opening statement. Moreover, he testified that he may not have moved for a mistrial at that stage in the trial because he did not want to give the prosecutor the opportunity to strengthen his presentation at a new trial. Defendant's other attorney, who had not taken a primary role in the trial, testified that he would have opposed making a motion for mistrial because he would not have wanted to give the prosecution another chance to strengthen its case and that he believed that the prosecutor decided not to seek introduction of the confession because some of the statements in the confession refuted other evidence in the prosecutor's case. He further testified that in formulating the issues for the appeal he researched the subject of the prosecutor's reference to the confession and the subsequent failure to introduce the confession, as a possible ground for appeal and concluded that it did not have merit, and also he felt that raising that subject on appeal would detract from the more meritorious arguments which were the thrust of the appeal. Defendant contends that the reason for the failure

of his attorneys to raise the issue at trial or at the appeal stage was either inadvertence or lack of knowledge of the applicable law. I do not find that those contentions have been proved by this record.

4. Considering the experience and competence of defendant's attorneys and the quality of the defense made in this case, I find that the situation here falls squarely within the language of *Engle* that "[c]ounsel might have overlooked or chosen to admit respondents' due process argument while pursuing other avenues of defense". Under the reasoning of *Engle* the situation existing here does not constitute cause justifying relief from the failure to make timely objection.

5. Since the Court has found that defendant has not met the "cause" prong of the "cause and prejudice" test, it is not necessary for the Court to discuss the "prejudice" prong, namely, whether the comments of the prosecutor "worked to [the defendant's] actual and substantial disadvantage infecting the entire trial with error of constitutional dimensions". This would call for an evaluation of the evidence presented at trial. It has been noted earlier in this Order that defendant has filed a motion for new trial based upon the decision of this Court in *State v. Young*, supra, which has been assigned to Judge O'Hara for appropriate action. Any consideration of the evidence in this case must include a consideration of the matters raised in that motion. In view of this, the Court will not comment further on the evidence in this case.

Based on the foregoing,

IT IS ORDERED that the motion of defendant for post-conviction relief based upon the reference by the

Deputy Attorney General in his opening statement to a confession by defendant is denied.

CLARENCE W. TAYLOR

J.

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

GEORGE LEE REYNOLDS, Defendant Below, Appellant,	)	
v.	)	No. 370 1983
STATE OF DELAWARE, Plaintiff Below, Appellee.	)	

Submitted: September 20, 1984
Decided: January 16, 1985

Before HERRMANN, Chief Justice, McNEILLY and HORSEY, Justices.

ORDER

This 16th day of January, 1985,

Upon consideration of the briefs submitted by the parties and their contentions at oral argument, it appears to the Court that:

(1) On June 15, 1977, defendant was convicted of Murder in the First Degree, Robbery in the First Degree, and Conspiracy in the Second Degree. This Court affirmed defendant's convictions on December 5, 1980. *Reynolds v. State*, Del. Supr., 424 A.2d 6 (1980).

(2) On June 29, 1982, defendant filed a motion for post-conviction relief pursuant to Superior Court Rule 35(a). The Superior Court denied the motion on December 9, 1983. The defendant appeals that denial to this Court.

(3) The issue which this Court confronts is whether the reference by the Deputy Attorney General in his opening statement to a confession by defendant followed by the failure of the Deputy Attorney General to put the confession into evidence during the trial warrants post-conviction relief where the defendant's attorney did not seek a mistrial during the course of the trial, and did not raise the issue on direct appeal.

(4) In *Conyers v. State*, Del. Supr., 422 A.2d 345 (1980), this Court held that where the defendant failed to make an objection at trial he must when seeking post-conviction relief show cause for relief from his failure to make a proper objection in the Trial Court and actual prejudice resulting from the alleged constitutional violation. The cause prong of the *Conyers* test precludes collateral review of claims which reasonably competent counsel intentionally chose not to press, in accordance with procedural rules, as part of a tactical strategy. *See Reed v. Ross*, 104 S.Ct 2901, 2909 (1984).

(5) The finding of the Trial Court as to whether a choice of counsel was strategic is a finding of fact that will not be disturbed upon appeal unless clearly erroneous. *See Harris v. State*, Del. Supr., 305 A.2d 318, 319 (1973), *Bowers v. State*, Del. Supr., 396 A.2d 962 (1978), *Washington v. Strickland*, 5th Cir., 693 F.2d 1243, 1256 (1982). Here, the Trial Court found that such a strategic choice was made and therefore, no cause existed for defendant's failure to make a proper objection. Upon a review of the record, we cannot say that the Trial Court's finding is clearly erroneous.

(6) Defendant urges this Court to modify its holding in *Conyers* by considering the cause requirement met if there would otherwise be a miscarriage of justice. Upon the facts of this case, we refuse to so modify our prior holding.

(7) The record contains sufficient evidence to support the Trial Judge's findings of fact contained in his letter opinion of December 9, 1983. To the extent the appeal presents issues of law, the same are clearly controlled by settled Delaware law.

NOW, THEREFORE, IT IS ORDERED that the decision of the Superior Court be and it hereby is

AFFIRMED.

BY THE COURT:

/s/ John J. McNeilly
Justice

SUPERIOR COURT
OF THE
STATE OF DELAWARE

ROBERT C. O'HARA
JUDGE

COURT HOUSE
WILMINGTON, DE
19801-3353

March 12, 1986

Gary A. Myers, Esq.
Deputy Attorney General
Department of Justice
P.O. Box 508
Georgetown, DE 19947

Mr. George L. Reynolds
Sussex Correctional Institution
R. D. 1, Box 500
Georgetown, DE 19947

Gentlemen:

RE: STATE v. GEORGE L. REYNOLDS
IS76-04-0026, 0027 – Motion per Rule 35(a)

This letter is intended as the Court's disposition of the defendant's pro se motion filed August 14, 1985. It should be noted initially that the Court has had the opportunity to consider the entire trial transcript, in connection with an earlier defendant motion for new trial decided adverse to defendant on January 29, 1986, the decision of Judge Taylor on December 9, 1983 denying defendant's previous motion under Rule 35(a) and the affirmation of that ruling by the Supreme Court under date of January 16, 1985, together with the contentions made by defendant in the current motion before the Court, the State's response thereto by letter dated February 17, 1986, and the defendant's letter response dated February 20, 1986.

The Court is persuaded that the arguments presented by the State, in its letter of February 17, 1986, and the authorities relied therein [upon], effectively support a denial of defendant's current motion. The Court is persuaded, for example, that the principles articulated in *Sanders v. United States*, 373 U.S. 1 (1963) are applicable and that the Court "need not entertain a second or successive motion for similar relief on behalf of the same applicant" except in extraordinary situations set forth in that decision.

Although the defendant is herein raising the issue of inadequacy of counsel, and error on the part of the Court, under constitutional labels for the first time, the record reflects, that the same issues were presented and determined by the Court in the motion decided by Judge Taylor and affirmed by the Supreme Court.

Stated briefly, the contentions of the defendant are grounded on the fact that the prosecutor at trial referred to the defendant's "confession" in his opening statement but subsequently abandoned efforts to present this "confession" as evidence at the trial, it being defendant's contention that his counsel should have moved for a mistrial because of the potential prejudice involved and/or that the Court should have taken such action on its own. However, the record reflects that these contentions were examined in full by Judge Taylor, after an evidentiary hearing, and that he was satisfied, from a legal standpoint, and was affirmed by the Supreme Court, that the defendant's experienced trial counsel had, in fact, made a strategic and tactical decision not to raise the mistrial issue believing that the defendant's position was at that point in time better before that jury than it could possibly

be at some subsequent trial if a mistrial had been granted.

The defendant in his current motion raises nothing new which, by any stretch of the imagination, would suggest that these earlier decisions by Judge Taylor and the Supreme Court were in error, or that a reexamination of the factual setting would in any way enhance the defendant's position under constitutional labels newly asserted.

It is the Court's conclusion that defendant's contentions have been fully and adequately presented and heard, and appropriate decisions reached thereon by Judge Taylor and the Supreme Court, leaving this Court no alternative but to summarily deny defendant's current motion for post-conviction relief pursuant to Rule 35(a).

IT IS SO ORDERED.

Respectfully,

/s/ Robert C. O'Hara

RCOH:dm
xc: Prothonotary – Sussex County

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

GEORGE L. REYNOLDS	)	No. 73, 1986
	)	Cr.A. Nos. IS76-04-0026,-0027
vs	)	
	)	Superior Court
STATE OF DELAWARE	)	Sussex County

The following docket entry has been made in the above cause.

5. March 26. Notice of voluntary dismissal by appellant.

6. March 26. Certified copy of dismissal to clerk of court below. Case closed.

cc: The Honorable Robert C. O'Hara
George L. Reynolds
Gary A. Myers, Esq.

Date: 3/26/86

/s/ LAC
Clerk

Rule 35, Delaware Superior Court Rules of Criminal Procedure (1975). Correction or Reduction of Sentence.

> (a) Postconviction Remedy. Any person who has been sentenced by the Court may apply by motion for postconviction relief for any meritorious claim challenging the judgment of conviction including claims: (i) That the conviction was obtained or sentence imposed in violation of the Constitution and laws of this State or the United States; (ii) that the Court imposing the sentence was without jurisdiction to do so; or (iii) that the sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law. An application may be filed at any time, provided, however, that postconviction relief shall not be available so long as there is a possibility of taking a timely appeal from the judgment of conviction. Unless the motion and the files and records of the case show to the satisfaction of the Court that the applicant is not entitled to relief, the Court shall cause notice thereof to be served on the Attorney General, grant a prompt hearing thereon, determine the issue and make findings of fact and conclusions of law with respect thereto. If the Court finds the applicant is entitled to relief, the Court may set aside the judgment, release the applicant from custody, resentence the applicant, grant the applicant a new trial, or otherwise correct the judgment of conviction as may appear appropriate. The Court need not entertain a second motion or successive motions for similar relief on behalf of the same applicant.
>
> . . . .

Rule 51, Delaware Superior Court Rules of Criminal Procedure (1975). Exceptions Unnecessary.

> Exceptions to rulings or orders of the Court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that

a party, at the time the ruling or order of the Court is made or sought, makes known to the Court the action which he desires the Court to take or his objection to the action of the Court and the grounds therefor. Where justice requires the Court may relieve a party from the consequences of failure to assign the proper reasons in support of an objection. If a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 52, Delaware Superior Court Rules of Criminal Procedure (1975). Harmless Error and Plain Error.

. . . .

(b) Plain Error. Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.